

* * * NOT FOR PUBLICATION * * *

NO. 25989

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Respondent-Plaintiff-Appellant,

vs.

ALLEN DALE TAVARES, Petitioner-Defendant-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 03-1-0062)MEMORANDUM OPINION(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.;
Acoba, J., concurring separately)

Petitioner-defendant-appellee Allen Dale Tavares timely petitioned this court for a writ of certiorari to review the Intermediate Court of Appeals' (ICA) memorandum opinion (mem. op.), filed on February 7, 2005. Therein, the ICA reversed the Circuit Court of the First Circuit's¹ Findings of Fact (FOFs), Conclusions of Law (COLs), and Order Granting Motion to Suppress Evidence and Statements (Suppression Order).

Briefly stated, Tavares was a passenger in a vehicle that was pulled over by the police and was eventually arrested for possessing a glass pipe with what appeared to be methamphetamine residue. On January 9, 2003, respondent-plaintiff-appellant State of Hawaii (the prosecution) charged

¹ The Honorable Reynaldo Graulty presided over the proceedings.

K. HANAKA
ADVISOR
CLERK, SUPREME COURT
STATE OF HAWAII

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Tavares by complaint with (1) one count of Promoting a Dangerous Drug in the Third Degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2003)² and (2) one count of Prohibited Acts Related to Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993).³ On April 14, 2003, Tavares filed a motion to suppress evidence and statements (motion to suppress) in which he sought to suppress the glass pipe, information regarding the contents of the pipe, and any alleged statements made by Tavares in connection with the pipe and its contents. On July 3, 2003, the trial court filed its order granting Tavares'

² HRS § 712-1243 states in pertinent part:

(1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

(2) Promoting a dangerous drug in the third degree is a class C felony.

(3) Notwithstanding any law to the contrary, except for first-time offenders sentenced under section 706-622.5, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

³ HRS § 329-43.5(a) states:

It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

motion to suppress. The prosecution appealed from the Suppression Order on July 23, 2003. On February 7, 2006, the ICA issued its mem. op., reversing the trial court's Suppression Order.

In his Application for Writ of Certiorari (Application), Tavares contended that the ICA "gravely erred in imputing reasonable suspicion to seize the passenger in a car during a traffic stop based on the 'suspicious conduct' of the passenger of 'repeatedly looking back at the officer' and his presence in the vehicle." Tavares' contention that the ICA erred was based on his belief that: (1) the police officers' questioning and detention of Tavares constituted a seizure; (2) the officer lacked reasonable suspicion to lawfully detain and question Tavares; (3) the officer could detain and question Tavares on a voluntary basis only; and (4) the evidence must be suppressed as fruit of the poisonous tree. We granted certiorari on March 17, 2006 and, for the reasons discussed herein, we:

- (1) affirm that part of the ICA's decision that vacated the trial court's Suppression Order with respect to the glass pipe;
- (2) reverse the ICA's decision with regards to Tavares' statement about the glass pipe and affirm the trial court's ruling that the statement is suppressed; and (3) remand this case to the circuit court for further proceedings.

I. BACKGROUND

The facts of this case are unchallenged and taken largely from the ICA's mem. op.

A. Evidence Presented at the Suppression Hearing

On October 1, 2002, shortly after midnight, Honolulu Police Department (HPD) Officer Damien Solon (Officer Solon) was on patrol in a marked blue and white police car in the Kapolei/Ewa area. While driving on Fort Weaver Road, Officer Solon noticed a red Nissan Sentra in front of him. Officer Solon's attention was drawn to the Sentra because the back-seat passenger, later identified as Tavares, kept looking back at Officer Solon. Officer Solon described Tavares as having his arm on the back rest and repeatedly looking forward and then looking back at Officer Solon. Officer Solon pulled alongside the Sentra and noticed that Tavares kept looking at the officer as did the driver, who appeared to be nervous.

After letting the Sentra proceed a good distance ahead, Officer Solon moved back into the Sentra's lane and followed. At the next intersection, the Sentra made an abrupt turn into the left-turn lane and stopped at a traffic light. Officer Solon called the police dispatcher and asked her to run the Sentra's rear license plate number. The dispatcher reported that the car had not been reported stolen but that the car's safety inspection and registration had expired in 2000. Officer Solon saw that the safety inspection sticker on the Sentra showed a 2003 expiration date, and he did not see a registration sticker. Officer Solon decided to pull the Sentra over to investigate the discrepancy between the expiration date of the safety inspection reported by the dispatcher and that reflected on the car's safety inspection sticker.

Officer Solon activated the blue lights on his police car. The Sentra, however, did not pull over but increased its speed. During Officer Solon's pursuit, the Sentra's lights were turned off. Officer Solon followed the Sentra as it proceeded into a residential subdivision and down a dead end street where it stopped. Officer Solon saw three doors open and a male driver, a female front-seat passenger, and Tavares emerge from the car. The driver ran away. Tavares raised his hands and approached Officer Solon, explaining that he did not know why the driver refused to stop. The female passenger did the same thing.

Officer Solon told Tavares and the female passenger to sit on the curb, which was separated from the sidewalk by a strip of gravel. Tavares complied and sat down. Officer Solon asked Tavares to identify the driver and Tavares supplied the driver's first name. Officer Solon then asked Tavares for personal information so the officer would know "who I was talking to." When Tavares gave his name, Officer Solon remembered Tavares from a prior incident in which Officer Solon had stopped and questioned Tavares as a

possible suspect, apparently in a car theft case.^[4] While obtaining personal information from Tavares, Officer Solon noticed a glass pipe, which appeared to contain methamphetamine residue, on the ground about six inches from where Tavares was sitting. The glass pipe had not been there before Tavares sat down.

After seeing the pipe, Officer Solon continued to question Tavares to obtain personal information, and while doing so, Officer Solon saw Tavares grab a handful of gravel and attempt to cover the pipe. Officer Solon told Tavares to stop and to leave the pipe alone. Tavares then grabbed the pipe, showed it to Officer Solon, and asked if Officer Solon "could hide it before the other officers come because [Tavares was] gonna get locked up for it." Officer Solon testified that Tavares's statement was not in response to any questioning by the officer. There is no evidence that Tavares was advised of his Miranda rights prior to his statement.^[5] Officer Solon recovered the glass pipe as evidence and placed Tavares under arrest.

After arresting Tavares, Officer Solon checked the vehicle identification number (VIN) on the Sentra to make sure that the license plates on the car were the plates actually issued to the vehicle. The previous check by the HPD dispatcher, which was based on the rear license plate number Officer Solon had called in, did not indicate that the car was stolen. Officer Solon, however, remained

⁴ The ICA noted that:

During the cross-examination of Officer Solon by counsel for Tavares, Officer Solon stated that he recognized Tavares after Tavares gave his name. Tavares' [] counsel asked Officer Solon whether Tavares had been a suspect in a car theft case in 1998. When Officer Solon indicated he did not recall the details of that case, Tavares' [] counsel provided Officer Solon with a copy of his police report to refresh his recollection. After reviewing the report, Officer Solon acknowledged that in 1998, he had stopped and questioned Tavares as a possible suspect but that Tavares was never charged with "that offense." In his testimony, Officer Solon did not explicitly acknowledge or state that the 1998 case was a car theft case.

Mem. Op. at 4.

⁵ The ICA further noted that:

Neither party asked Officer Solon at the suppression hearing whether Officer Solon had advised Tavares of his Miranda rights. HPD Officer Corine Rivera (Officer Rivera), who arrived after Tavares had been arrested, testified that she had not been informed by anyone that Tavares had been given any Miranda warnings. Officer Rivera testified that she asked Tavares and the female passenger to prepare written statements. Tavares' [] statement concerned only the identity of the driver and Tavares' [] efforts to get the driver to stop. Officer Rivera stated that she did not give Tavares any Miranda warnings.

Mem. Op. at 5.

suspicious about the car's status because of the discrepancy regarding the expiration date for the safety inspection and the driver's conduct in refusing to pull over and then fleeing on foot. After obtaining the Sentra's VIN number, Officer Solon verified that the VIN number matched the car and the license plates on the car.

Mem. Op. at 2-5.

B. Tavares' Motion to Suppress Evidence and Statements

In his Motion to Suppress, heard on May 5, 2003, Tavares sought to suppress the glass pipe found by Officer Solon and any statements he made at the time of his arrest. Tavares argued that "the pipe constituted evidence obtained from warrantless searches and seizures of [his] property, which violated his rights under article I, section 7, of the Hawai'i State Constitution and the Fourth and Fourteenth Amendments [to the United States Constitution]."

At the hearing on June 9, 2003, the circuit court orally granted Tavares' Motion to Suppress and, on July 3, 2003, issued its Suppression Order, which provided in pertinent part:

FINDINGS OF FACT

1. Honolulu Police Officer Damien Solon observed a vehicle whose rear passenger and driver appeared to be looking at him in his marked police vehicle on Fort Weaver Rd on October 1, 2002.
2. Defendant was the rear seat passenger in a vehicle driven by a third party.
3. Officer Solon radioed in to check the license plates of the vehicle and learned it had not been reported stolen.
4. He was also advised by dispatch that police records indicated the vehicle's safety check and registration had expired in 2000.
5. Officer Solon saw a safety sticker on the vehicle which purported to be valid until August of 2003.

6. He attempted to stop the vehicle to investigate the discrepancy, at which time the vehicle refused to stop and continued driving with Officer Solon in pursuit until it stopped near the intersection of Kaneana St. and Poea St.
7. Defendant and the other passenger, a female, exited the vehicle and awaited the arrival of Officer Solon, but the driver fled.
8. When Solon arrived, Defendant was ordered to sit where he stood, and was not free to leave.
9. Defendant was asked about the driver of the vehicle and provided a name to the officer.
10. Officer Solon continued to detain Defendant to obtain personal information from him as well as to inquire further about the driver.
11. Defendant was not given Miranda warnings.
12. While questioning Defendant, Officer Solon noticed a glass pipe on the ground beside Defendant.
13. As the questioning continued, Officer Solon saw Defendant attempt to cover the pipe with the gravel on the ground where he was seated.
14. Solon then ordered Defendant to stop covering the pipe, at which time Defendant asked Officer Solon if he would hide the pipe before the other officers came.
15. Officer Solon then seized the pipe.

CONCLUSIONS OF LAW

1. Under State v. Kauhi, 86 Haw. [sic] 195, 948 P.2d 1036 (1997), the Defendant in the instant case had been "seized," such that a reasonable person in that circumstance would not have believed he was free to leave.
2. The words spoken by Defendant were the result of interrogation while he was in custody, under State v. Ketchum, 97 [Hawai'i 107], 34 P.3d 1006 (2001).
3. The continued questioning required the giving of Miranda warnings to the Defendant (State v. Ah Loo, 94 [Hawai'i] 201, 9 P.3d [513] ([App.] 2000)), but none were given.
4. The evidence seized from the Defendant and the statements made by the Defendant were each "fruits of the poisonous tree" of the illegal detention and are thus suppressed.

ORDER

IT IS HEREBY ORDERED that the evidence seized from the Defendant and the statements made by him are suppressed and precluded from use at trial.

C. ICA Appeal and Disposition

On appeal, the State maintained that the evidence in the record did not support the trial court's FOFs and that the applicable and controlling law did not support the COLs.⁶ On February 7, 2006, the ICA reversed the trial court's Suppression Order. The ICA agreed with the State's contentions, holding that (1) the initial investigative stop was lawful inasmuch as the evidence supported Officer Solon's reasonable suspicions and that, (2) contrary to the trial court's COLs, Tavares' statements were admissible because Officer Solon's questions were within the scope of the initial stop and did not amount to "interrogation" requiring Miranda warnings. Mem. Op. at 9-12. On March 9, 2006, Tavares filed his timely Application to this court for review of the ICA's mem. op. The Application was granted on March 17, 2006.

⁶ In its Opening Brief, the State noted, inter alia, that, in COL no. 3, the trial court's citation to the ICA's decision in Ah Loo was in error as that decision was reversed by this court on certiorari. See 94 Hawai'i 207, 10 P.3d 728 (2000). Therein, this court held that a person who is seized is not in custody so as to require Miranda warnings before questioning until the point of accusation or arrest has been reached or questioning has become sustained or coercive. Ah Loo, 94 Hawai'i at 207, 10 P.3d at 728.

II. STANDARD OF REVIEW

The right/wrong standard applies to questions of constitutional law. Ah Loo, 94 Hawai'i at 209, 10 P.3d at 730. Appellate review of a trial court's motion to suppress is de novo. State v. Maldonado, 108 Hawai'i 436, 442, 121 P.3d 901, 907 (2005) (citing State v. Kauhi, 86 Hawai'i at 197, 948 P.2d at 1038).

[T]he proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his own Fourth Amendment rights were violated by the search and seizure sought to be challenged. The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence.

Id. (citing State v. Anderson, 84 Hawai'i 462, 467, 935 P.2d 1007, 1012 (1997) (brackets in original)).

III. DISCUSSION

A. Whether the Initial Stop was Lawful

Tavares contends that the ICA erred in concluding that the initial stop of the vehicle by Officer Solon was lawful. Specifically, Tavares argues that his "repeated glances at the officer, the driver's possible traffic violation(s), and [his] presence in the vehicle fail to constitute specific and articulable facts in which a reasonable person would believe that criminal activity was afoot[.]" We disagree.

Article I, section 7 of the Hawai'i Constitution⁷ and the fourth amendment to the United States Constitution⁸ protect the right of people to be secure in their persons and to be free from unreasonable searches and seizures. The Hawai'i appellate courts have expanded the fourth amendment protections based upon the additional protection against unreasonable invasions of privacy under the Hawai'i Constitution. State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974); State v. Kachanian, 78 Hawai'i 475, 480, 896 P.2d 931, 936 (App. 1995).

Stopping a vehicle in which a person is riding constitutes a seizure of that person under the fourth amendment that may be justified provided it is not unreasonable. State v. Ogata, 58 Haw. 514, 516, 572 P.2d 1222, 1224 (1977) (citing Terry v. Ohio, 392 U.S. 1 (1968)). It is well established that a seizure may be reasonable even if probable cause is lacking, if the police officer, "in appropriate circumstances and in an appropriate manner[,] approach[es] a person for purposes of

⁷ Article I, section 7 of the Hawai'i Constitution provides in relevant part:

The right of people to be secure in their persons . . . and effects against unreasonable searches, seizures and invasion of privacy shall not be violated and no warrants shall issue but upon probable cause . . . particularly describing . . . the persons or things to be seized[.]

⁸ The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

investigating possible criminal behavior[.]” State v. Barnes, 58 Haw. 333, 337, 568 P.2d 1207, 1211 (1977) (citation omitted).

To justify an investigative stop, short of an arrest based on probable cause, 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. The ultimate test in these situations must be whether from these facts, measured by an objective standard, a man of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate.

Id. at 338, 568 P.2d at 1211 (citations and internal quotation marks omitted).

Here, the ICA concluded that the initial stop was lawful because Officer Solon had “reasonable suspicion” to stop the Sentra based on Tavares’ conduct in “repeatedly looking back at the officer’s car” and “the discrepancy regarding the expiration date of the car’s safety inspection.” Mem. Op. at 9. The ICA noted that Officer Solon’s “objective basis for suspecting criminal activity intensified when, in response to the officer’s signal to pull over, the driver of the Sentra sped away, turned off the car’s lights, and fled on foot after stopping at a dead end street.” Mem. Op. at 9. Additionally, in response to Tavares’ contention that Officer Solon’s suspicions pertained only to the driver and did not provide a basis to detain Tavares, the ICA held that Tavares’ presence in the car linked him to the driver. Mem. Op. at 9. The record indicates that, after Tavares exited the vehicle and was instructed to sit down on the curb but prior to observing the glass pipe on the ground, Officer Solon asked questions as to: (1) the identity of

the driver; (2) the reason why he fled; and (3) Tavares' identity. We agree with the ICA that, inasmuch as Officer Solon's questions were designed to "confirm or dispel" his suspicion that the car's safety check discrepancy related to a possible traffic violation or theft, the initial investigative detention was lawful. Therefore, the seizure of the glass pipe, which was in plain view, was also lawful. Consequently, the evidence seized, i.e., the glass pipe, was not fruit of the poisonous tree. See State v. Meyer, 78 Hawai'i 308, 317, 893 P.2d 159, 168 (1995) (holding that, "where a governmental agent is engaged in a lawful intrusion and inadvertently observes evidence of a crime, the seizure of such evidence does not require any further constitutional protection"). Accordingly, the ICA was correct in concluding that the glass pipe should not have been suppressed.

B. Whether "Custodial Interrogation" Took Place

Tavares next contends that the ICA erred in holding that his statements should not have been suppressed because: (1) Officer Solon did not inform him that he was free to leave or that the encounter was voluntary; and (2) Officer Solon had (a) ordered Tavares to sit on the ground, (b) questioned him, (c) detained him for a prolonged period of time after Tavares had answered Officer Solon's questions, and (d) acknowledged that Tavares was not free to leave. We agree with Tavares that the ICA erred in concluding that it "need not decide whether Tavares

was in custody when he made the statement" relating to the glass pipe because it determined that the statement "was not the product of 'interrogation.'" Mem. Op. at 11.

As stated previously, persons detained pursuant to traffic stops have had a "significant deprivation" of their freedom and are "seized" for fourth amendment purposes. Nevertheless, Miranda warnings are generally not required prior to questioning that is incident to a lawful traffic stop. State v. Kaleohano, 99 Hawai'i 370, 378, 56 P.3d 138, 146 (2002) (holding that, where a defendant was pulled over for crossing the dividing line twice and the police officer noted that the defendant's eyes were red and glassy, "Miranda warnings were simply not warranted when [the defendant] was questioned about her alcohol consumption"); see also State v. Kuba, 68 Haw. 184, 189, 706 P.2d 1305, 1310 (1985) (holding that, where the defendant was stopped for straddling two lanes of traffic and driving at an abnormally slow speed, Miranda warnings were not required prior to questioning the defendant regarding alcohol or drug impairment); State v. Wyatt, 67 Haw. 293, 300-01, 687 P.2d 544, 550 (1984) (holding that, after stopping defendant for driving without headlights, police officer who detected smell of alcohol emanating from the vehicle was not required to issue Miranda warnings prior asking the defendant whether she had been drinking). The Wyatt court noted that its holding was consistent

with the similar holding in Berkemer v. McCarty, 468 U.S. 420 (1984), wherein the United States Supreme Court explained that:

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced to speak where he would not otherwise do so freely. First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. . . .

. . . .
Second, . . . circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police.

Id. at 438 (internal quotation marks and citations omitted). In commenting upon concerns that an "exemption" of traffic stops from the coverage of Miranda would open the way to abuse, the Berkemer Court cautioned that, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Id. at 440 (citation omitted). The Berkemer Court noted that its ruling would

mean that the police and [trial] courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that Miranda applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws -- by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists -- while doing little to protect citizens' Fifth Amendment rights. The second would enable the police to circumvent constraints on custodial interrogations established by Miranda.

468 U.S. at 441 (footnote omitted) (emphasis added).

In Ah Loo, this court recognized the same difficulty in determining when the need for Miranda warnings arises in the context of a lawful investigatory stop, noting that,

if the detained person's responses to a police officer's questions provide the officer with probable cause to arrest or, alternatively, if [the] officer's questions become sustained and coercive (such that the officer's questions are no longer reasonably designed to briefly confirm or dispel his or her reasonable suspicion), the officer is -- at that time -- required to inform the detained person of his or her constitutional rights against self-incrimination and to counsel, as mandated by Miranda and its progeny.

Id. at 212, 10 P.3d at 733 (first emphasis added) (second emphasis in original) (footnote omitted). In State v. Wallace, 105 Hawai'i 131, 94 P.3d 1275 (2004), this court applied a similar test, i.e., that a person is "in custody" if

an objective assessment of the totality of the circumstances reflects either (1) that the person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that they are no longer reasonably designed briefly to confirm or dispel their reasonable suspicion or (2) that the point of arrest has arrived because . . . probable cause to arrest has developed[.]

Id. at 140, 94 P.3d at 1284 (quoting Ketchum, 97 Hawai'i at 126, 34 P.3d at 1025. In the traffic stop context, this court applied the "totality of the circumstances" test to determine whether the defendant in Wyatt -- and, subsequently, the defendant in Kuba -- was "in custody" such that the questions regarding alcohol consumption amounted to "custodial interrogation." Wyatt, 62 Haw. at 299, 687 P.2d at 549; Kuba, 68 Haw. at 189, 706 P.2d at 1310. Thereafter, in Kaleohano, this court, relying on Ah Loo, looked -- as it did in Ketchum and Wallace -- to whether probable cause had developed as a factor in determining if Miranda

warnings were required under the totality of the circumstances. Kaleohano, 99 Hawai'i at 377, 56 P.3d at 145. We, therefore, now examine whether, during the course of Tavares' lawful investigatory stop, the need for Miranda warnings arose under the totality of the circumstances.

In the instant case, we agree with the ICA that Officer Solon's initial questioning regarding the driver and the reasons for the driver's flight did not amount to custodial interrogation inasmuch as they were intended to briefly confirm or dispel the officer's suspicions. However, based on the totality of the circumstances, the instant case involves a situation unlike the usual traffic stop. Here, the driver, who is the usual focus of the traffic stop, fled the scene, leaving the passengers little reason to believe that the stop would be "temporary and brief" or even related to a traffic violation once the driver fled. Indeed, Tavares indicated that he believed he was not free to leave. By the time Officer Solon saw the pipe, Tavares had informed him of the driver's first name and had stated that he did not know why the driver fled. As the ICA correctly noted, probable cause to arrest Tavares existed at the point when Officer Solon saw the glass pipe next to Tavares while asking for Tavares' personal information. Mem. Op. at 10. See State v. Naeole, 80 Hawai'i 419, 424, 910 P.2d 732, 737 (1996) (holding that the presence of drug paraphernalia in plain view within the defendant's control amounted to probable cause for possession

under HRS § 712-1243(1)). Nevertheless, Officer Solon never stated that he gave Tavares his Miranda warnings and, instead, indicated that he continued to ask Tavares for personal information. Moreover, Officer Solon watched as Tavares attempted to cover the pipe and then ordered him to stop what he was doing. Once he saw the pipe, Officer Solon should have realized that his continued questioning of Tavares and his conduct were likely to lead to eliciting an incriminating response and, as such, Miranda warnings were necessary. See Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (noting that "interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response") (footnote omitted). Thus, given the totality of the circumstances, we conclude that Tavares was subjected to "custodial interrogation" and that his statement regarding the glass pipe should have been suppressed. Accordingly, we hold that the ICA erred in reversing the trial court's Suppression Order with respect to Tavares' statement, i.e., asking the police officer to hide the glass pipe "before the other officers come because [Tavares was] gonna get locked up for it."

IV. CONCLUSION

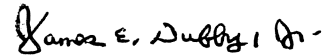

Based on the foregoing, we affirm that part of the ICA's decision that vacated the trial court's Suppression Order

with respect to the glass pipe. We reverse the ICA's decision with regards to Tavares' statement about the glass pipe and affirm the trial court's ruling that the statement is suppressed. Accordingly, this case is remanded to the circuit court for further proceedings.

DATED: Honolulu, Hawai'i, April 7, 2006.

Taryn R. Tomasa,
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on the brief and the
application, for petitioner-
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Loren J. Thomas,
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on the brief, for respondent-
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CONCURRENCE BY ACOBA, J.

I concur in the result only.

