

*** NOT FOR PUBLICATION ***

NO. 26725

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

 STATE OF HAWAI'I,
 Plaintiff-Appellant-Petitioner,

vs.

 LORNA ALVAREZ,
 Defendant-Appellee-Respondent.

 NORMA T. YARRA
 CLERK, APPELLATE COURTS
 STATE OF HAWAII

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FILED

 CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
 (CR. NO. 02-1-0419)
SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ.,
 and Acoba, J., dissenting, with whom Duffy, J., joins)

On January 20, 2006, the plaintiff-appellant-petitioner State of Hawai'i [hereinafter, "the prosecution"] filed an application for writ of certiorari ex officio in the circuit court of the third circuit, requesting that this court review the memorandum opinion of the Intermediate Court of Appeals (ICA) in State v. Alvarez, No. 26725 (December 21, 2005) [hereinafter, the "ICA's opinion"], affirming the order of the circuit court of the third circuit, filed on June 28, 2004, granting the defendant-appellee-respondent Lorna Alvarez's motion to suppress statements. In its application for certiorari, the prosecution argues that the ICA erred in "establishing a 'bright-line' rule that creates 'sustained and coercive' questioning anytime [sic] an interviewee is asked a question twice."

Upon carefully reviewing the record and the application for writ of certiorari and having given due consideration to the arguments advanced and the issues raised, we reverse the ICA's

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December 21, 2005 memorandum opinion and vacate in part the circuit court's June 28, 2004 order and remand for further proceedings consistent with this order.

The circuit court's uncontested findings of fact (FOFs) set forth the relevant sequence of events as follows:

20. OFFICER FELICIANO asked DEFENDANT if DION ALVAREZ was there;

21. DEFENDANT responded . . . "No, he not here, rumors were he was in Puna";

22. OFFICER FELICIANO requested permission to enter the home and DEFENDANT refused entry;

23. OFFICER FELICIANO then left the front porch area and conferred with Detective Evangelista in the front of DEFENDANT's home;

32. DETECTIVE EVANGELISTA . . . questioned DEFENDANT about DION ALVAREZ;

34. During the questioning by DETECTIVE EVANGELISTA, DEFENDANT informed DETECTIVE EVANGELISTA, "No, you can't come into my house. He's not here. He's in Puna,"

35. DETECTIVE EVANGELISTA requested permission to search the home and DEFENDANT denied same;

36. During the questioning of DEFENDANT, DETECTIVE [EVANGELISTA] told DEFENDANT that if he had to seek a search warrant and DION was found in DEFENDANT's home, DEFENDANT could be arrested for Hindering Prosecution;

37. DEFENDANT told DETECTIVE EVANGELISTA, "well, go do that then."

We agree in part with the position taken by ICA Associate Judge Fujise in her concurring and dissenting opinion, specifically, that Sergeant Evangelista's statement to Alvarez that "if he had to seek a search warrant and Dion was found in [her] home, [Alvarez] could be arrested for hindering prosecution" was coercive and that Alvarez's subsequent response was properly suppressed. Concurring and dissenting opinion at 1 (capitalization altered).

As the circuit court concluded, "Office Feliciano's questioning was reasonably designed to confirm or dispel as

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briefly as possible and without any coercive connotations his suspicions of criminal activity and therefore Miranda v. Arizona, 384 U.S. 436 (1966),] [r]ights were not required." ICA's opinion at 5. Similarly, Sergeant Evangelista's question to Alvarez regarding whether her son Dion was in her home was designed for informational purposes only. At the times Officer Feliciano questioned Alvarez and Sergeant Evangelista first reiterated the same questions, Alvarez was neither in custody nor interrogated. State v. Ketchum, 97 Hawai'i 107, 34 P.3d 1006 (2001); State v. Patterson, 59 Haw. 357, 581 P.2d 752 (1978). There was no reason to foresee that Officer Feliciano's questions or Sergeant Evangelista's reiterated preliminary questions would elicit an incriminating response from Alvarez. Thus, Sergeant Evangelista's first inquiry, described in FOF No. 32, was "reasonably designed to confirm or dispel as briefly as possible and without coercive connotations his suspicions of criminal activity," such that Sergeant Evangelista was not required to inform Alvarez of her constitutional rights against self-incrimination and to counsel, as mandated by Miranda and its progeny. State v. Ah Loo, 94 Hawai'i 207, 10 P.3d 728 (2000).

We hold that Sergeant Evangelista's statement to Alvarez that "if he had to seek a search warrant and Dion was found in [her] home, [Alvarez] could be arrested for hindering prosecution" was coercive and that Alvarez's subsequent response was properly suppressed. Therefore, Alvarez's subsequent response recorded in FOF No. 37 as "well, go do that then" was properly suppressed. Inversely, the circuit court's suppression

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of Alvarez's statement in FOF No. 34 that "No, you can't come into my house. He's not here. He's in Puna," was erroneously suppressed. Therefore,

IT IS HEREBY ORDERED that the December 21, 2005 memorandum opinion of the Intermediate Court of Appeals is reversed and the June 28, 2004 order of the circuit court is vacated in part with respect to Alvarez's response to Detective Evangelista's inquiry, recorded in FOF No. 34, the effect that "No, you can't come into my house. He's not here. He's in Puna." Accordingly, the present matter is remanded for further proceedings consistent with this order.

DATED: Honolulu, Hawai'i, February 28, 2006.

Darren W.K. Ching,
Deputy Prosecuting Attorney,
for the plaintiff-appellant-
petitioner, State of Hawai'i,
on the writ



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