

*** FOR PUBLICATION ***

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM LEVINSON, J., JOINS

Although I concur in the result, I decline to join in the opinion of the court. I disagree with the court's characterization of the holding in State v. Pebria, 85 Hawai'i 171, 938 P.2d 1190 (App.1997). Furthermore, inasmuch as the trial court was mistaken in its conclusion that "the post-Miranda portion of the statement is also independently inadmissible pursuant to [Pebria] in that . . . the initial illegality was exploited and perpetuated, tainting the entire statement," I would not affirm the trial court's determination on the grounds articulated therein.

The majority cites Pebria for the proposition that "[b]ecause [Joseph] was not [warned of his right to remain silent prior to the pre-interview], all statements obtained from him must be suppressed, along with the fruits of the pre-interview statements." Majority at V (citing Pebria, 85 Hawai'i at 174-75, 938 P.2d at 1193-94). Pebria states:

As applied to confessions, the "fruit of the poisonous tree" doctrine holds that where one confession or admission is illegally obtained and subsequently the defendant makes a further confession, the second confession is inadmissible in evidence as a "fruit of the poisonous tree" if it results from an exploitation of the prior illegality.

Pebria, 85 Hawai'i at 175, 938 P.2d at 1194 (emphasis added). As applied to this case, Pebria stands for the proposition that "[b]ecause [Joseph] was not [warned of his right to remain silent prior to the pre-interview], all statements obtained from him must be suppressed" if such statements result from an exploitation of the pre-interview statement. In other words, only statements that are themselves "fruits" of the non-mirandized statements must be suppressed. There must be a causal

nexus, a "fruiting," a relationship between the suppressed non-mirandized statement and the subsequent mirandized and otherwise-admissible statement such that if the prior statement had not been made, the defendant might not have offered the subsequent statement; otherwise, the subsequent statement may be introduced into evidence.

In Pebria, the ICA reviewed the following conclusion of the trial court:

Furthermore, the problems Officer Rodriguez had in failing to advise [Pebria] of his constitutional rights carried over into the formal statement with Detective Jones, because Detective Jones relied on those statements to Officer Rodriguez in conducting his interview. And so the Court believes that the statements made to Officer Rodriguez must be suppressed, because [Pebria] was not properly advised of his constitutional rights and the formal statement must also be suppressed, because it is a fruit of the prior illegality.

Pebria, 85 Hawai'i at 175-76, 938 P.2d at 1194-95. The ICA stated "These findings are not clearly erroneous and the conclusion is not wrong." Id., 85 Hawai'i at 176, 938 P.2d at 1195. The trial court's seventh conclusion of law in the instant case is analogous to the above-quoted conclusion from Pebria. It states that "the post-Miranda portion of the statement is also independently inadmissible pursuant to [Pebria] in that . . . the initial illegality [i.e. unlawfully obtaining the pre-Miranda portion of the statement] was exploited and perpetuated, tainting the entire statement." In order to uphold the trial court's determination on the grounds articulated in that conclusion, we must independently determine that its conclusion was correct.

The trial court's seventh conclusion of law

incorporates a factual determination with respect to whether the subsequent statement "exploited and perpetuated" the "initial illegality" of the inadmissible non-mirandized statement. A conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are dependent on the facts and circumstances of each individual case. As the ICA explained in State v.

Medeiros:

In determining whether a second confession has become tainted by the prior illegally obtained confession, other courts have established criteria to assist them. Among the criteria most often considered are the time and place of the subsequent confession, the manner of interrogation, whether there was representation by counsel, the defendant's mental condition, conduct of the police, whether the defendant has had an opportunity to speak with family and friends, whether the defendant is in a position where he believes that his first confession has made his present position hopeless, and whether the subsequent confessions were a product of interrogation or voluntarily made.

Medeiros, 4 Haw.App 248, 252-53, 665 P.2d 181, 184-85. In performing this determination, we are mindful of the phenomenon described by the United States Supreme Court in United States v.

Bayer:

Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

Bayer, 331 U.S. 532, 540-41 (1947). However, as the court noted in Bayer, it had "never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." Id. Neither have we.

Having performed a searching review of the transcripts of both the pre-interview and the purportedly tainted post-Miranda statement, and in light of the criteria collected in Medeiros, I am left with a firm and definite conviction that the trial court was mistaken in its conclusion that "the initial illegality was exploited and perpetuated, tainting the entire statement." The defendant consulted with his family and counsel and decided to turn himself in. After further consultation with counsel, the defendant then participated with his counsel in a proffer. Following the proffer, the defendant, in the company of counsel and having gone through the Miranda ritual, made a statement to the police. Nothing in the transcripts suggests improper conduct by the police, an inappropriate mental state on the defendant's part, or any belief on the defendant's part that his participation in the proffer had made his situation hopeless, such that he had no choice but to reiterate and expand upon any prior inculpatory statements elicited during the proffer. In short, there is no credible evidence of sufficient quality and probative value to justify a reasonable person in a conclusion that the subsequent statement came to light as a result of the exploitation of the inadmissible non-mirandized statement. On the contrary, the evidence strongly supports the following inferences: (1) prior to the interview, the defendant, relying on the advice of counsel, had made up his mind to make a statement to the police; (2) nothing transpired during the proffer that either influenced the defendant's subsequent decision to waive his right against self-incrimination or enabled

the police to obtain information that the defendant would not have otherwise revealed in his post-waiver statement; and (3) if the proffer had not been made, and the interview instead had begun with the Miranda ritual and proceeded directly into formal interrogation of the defendant, the defendant would have provided a fungibly-inculpatory statement. Consequently, I would hold that the trial court was wrong in its conclusion that "the post-Miranda statement is also independently inadmissible pursuant to State v. Pebria."

I concur in the result because the circumstances demonstrate that the defendant received ineffective assistance of defense counsel in connection with the defendant's waiver of his right against self-incrimination. The Miranda warnings have significance beyond mere ritual only to the extent that they effectively safeguard the oft-articulated requirement that a defendant's waiver of his constitutional right against self-incrimination be "knowing, intelligent, and voluntary." It is apparent from the record that the defendant's waiver, based on advice from counsel that did not meet the minimum requirements of effective assistance, was not "knowing, intelligent, and voluntary." I would uphold the trial court's determination on that basis, as articulated in its first conclusion of law.

Steve D. Larrison

James C. [unclear]