

NO. 27320

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

BOBBY LAIOHA MACOMBER, Defendant-Appellant

E.M. RIMANDO
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STATE OF HAWAII

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FILED

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 03-1-0286K)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-appellant Bobby Laioha Macomber [hereinafter "Macomber"] appeals from the third circuit court's April 26, 2005 judgment convicting him of the offenses of first degree burglary, in violation of Hawai'i Revised Statutes [hereinafter "HRS"] § 708-810,¹ first degree robbery, in violation of HRS § 708-840,²

¹ HRS § 708-810 (1993) provides as follows:

§708-810 Burglary in the first degree. (1) A person commits the offense of burglary in the first degree if the person intentionally enters or remains unlawfully in a building, with intent to commit therein a crime against a person or against property rights, and:

- (a) The person is armed with a dangerous instrument in the course of committing the offense; or
- (b) The person intentionally, knowingly, or recklessly inflicts or attempts to inflict bodily injury on anyone in the course of committing the offense; or
- (c) The person recklessly disregards a risk that the building is the dwelling of another, and the building is such a dwelling.

(2) An act occurs "in the course of committing the offense" if it occurs in effecting entry or while in the building or in immediate flight therefrom.

(3) Burglary in the first degree is a class B felony.

² HRS § 708-840 (1993 & Supp. 1998) sets forth the following:

§708-840 Robbery in the first degree. (1) A person commits the offense of robbery in the first degree if, in the course of committing theft:

- (a) The person attempts to kill another, or intentionally

third degree theft, in violation of HRS § 708-832,³ kidnapping, in violation of HRS § 707-720,⁴ use of a firearm in the

or knowingly inflicts or attempts to inflict serious bodily injury upon another; or

(b) The person is armed with a dangerous instrument and:

(i) The person uses force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance; or

(ii) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

(2) As used in this section, "dangerous instrument" means any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or threatened to be used is capable of producing death or serious bodily injury.

(3) Robbery in the first degree is a class A felony.

³ HRS § 708-832 (1993) provides as follows:

§708-832 Theft in the third degree. (1) A person commits the offense of theft in the third degree if the person commits theft:

- (a) Of property or services the value of which exceeds \$100; or
 - (b) Of gasoline, diesel fuel or other related petroleum products used as propellants or any value not exceeding \$200.
- (2) Theft in the third degree is a misdemeanor.

⁴ HRS § 707-720 (1993) provides as follows:

§707-720 Kidnapping. (1) A person commits the offense of kidnapping if the person intentionally or knowingly restrains another person with intent to:

- (a) Hold that person for ransom or reward;
- (b) Use that person as a shield or hostage;
- (c) Facilitate the commission of a felony or flight thereafter;
- (d) Inflict bodily injury upon that person or subject that person to a sexual offense;
- (e) Terrorize that person or a third person; or
- (f) Interfere with the performance of any governmental or political function.

(2) Except as provided in subsection (3), kidnapping is a class A felony.

(3) In a prosecution for kidnapping, it is a defense which reduces the offense to a class B felony that the defendant voluntarily released the victim, alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial.

commission of a felony, in violation of HRS § 134-6(a),⁵ and impersonating a law enforcement officer in the first degree, in violation of HRS § 710-1016.6.⁶ Macomber presents the following points of error on appeal: (1) the circuit court failed to determine whether his statements, made while in police custody, were voluntary; and (2) even if the circuit court concluded that his statements were voluntary, its conclusion was erroneous insofar as (a) the police violated HRS § 803-9(2) by refusing to accommodate his request for counsel, (b) his fifth amendment rights were violated because he was questioned while being held

⁵ HRS § 134-6(a) (Supp. 2003) provides as follows:

§134-6 Carrying or use of firearm in the commission of a separate felony; place to keep firearms; loaded firearms; penalty. (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was loaded or not, and whether operable or not; provided that a person shall not be prosecuted under this subsection where the separate felony is:

- (1) A felony offense otherwise defined by this chapter;
- (2) The felony offense of reckless endangering in the first degree under section 707-713;
- (3) The felony offense of terroristic threatening in the first degree under section [707-716(1)(a)], [707-716(1)(b)], and [707-716(1)(d)]; or
- (4) The felony offenses of criminal property damage in the first degree under section 708-820 and criminal property damage in the second degree under section 708-821 and the firearm is the instrument or means by which the property damage is caused.

(Brackets in original.)

⁶ HRS § 710-1016.6 (1993) provides as follows:

§710-1016.6 Impersonating a law enforcement officer in the first degree. (1) A person commits the offense of impersonating a law enforcement officer in the first degree if, with intent to deceive, the person pretends to be a law enforcement officer and is armed with a firearm.

(2) Impersonating a law enforcement officer in the first degree is a class C felony.

in the cell block without proper Miranda warnings, and (c) he was effectively denied his right to counsel when the police interrogated him outside of his counsel's presence.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that Macomber's opening brief fails to comply with the mandatory requirements of Hawai'i Rules of Appellate Procedure [hereinafter "HRAP"] Rule 28(b)(4)(iii) (2005) insofar as it fails to identify "where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency." The circuit court may thus be affirmed on that ground alone. See Onaka v. Onaka, 2006 WL 2500587, *13 (August 30, 2006) ("[W]e decline to canvas the record to verify whether [the appellant] appropriately preserved her points of error on appeal by making a timely objection to the challenged actions, and her appellate arguments are deemed waived."); Kienker v. Bauer, 110 Hawai'i 97, 104 n.12, 129 P.3d 1125, 1132 n.12 (2006) ("The appellate courts are not obligated to search the record to crystallize the parties' arguments.").

The foregoing violation notwithstanding, we further hold that Macomber's appellate arguments are without merit inasmuch as: (1) the circuit court complied with its duty⁷ to ensure the voluntariness of Macomber's confession by granting the

⁷ See State v. Goers, 61 Haw. 198, 199-200, 600 P.2d 1142, 1143 (1979) ("[A] trial judge must make a threshold determination of the voluntariness of a confession before the jury may consider it."); State v. White, 1 Haw. App. 221, 224, 617 P.2d 98, 101 (1980) ("The trial judge has a duty to determine the admissibility of an inculpatory statement out of the presence of the jury and prior to the jury's exposure to such evidence.").

prosecution's "Motion To Determine Voluntariness Of Defendant's Statement"; and (2) Macomber's confession was not obtained in violation of his statutory and constitutional rights inasmuch as (a) assuming, arguendo, that the more than twenty-four-hour delay violated HRS § 803-9(2) (1993),⁸ Macomber failed to demonstrate, by a preponderance of the evidence, that it contributed to his decision to confess,⁹ (b) Macomber was adequately advised of his constitutional rights on October 6, 2003, and he does not argue that the warnings became stale¹⁰ by the time the police attempted

⁸ HRS § 803-9(2) (1993) provides that

[i]t shall be unlawful in any case of arrest for examination . . . [t]o unreasonably refuse or fail to make a reasonable effort, where the arrested person so requests and prepays the cost of the message, to send a telephone, cable, or wireless message through a police officer or another than the arrested person to the counsel or member of the arrested person's family[.]

⁹ See State v. Edwards, 96 Hawai'i 224, 239, 30 P.3d 238, 253 (2001) ("[W]hile we have determined that the police did not use reasonable efforts to contact counsel, we must conclude Defendant failed to prove, by a preponderance of evidence, that her statements were 'illegally obtained.'"); cf. State v. Ababa, 101 Hawai'i 209, 217-18, 65 P.3d 156, 164-65 (2003) ("On the record, there was evidence to a preponderant degree . . . that the violation of HRS §§ 803-9(2) and 803-9(4) 'ultimately had an adverse impact on [Petitioner]'s substantive rights.'") (Citing Edwards, 96 Hawai'i at 239, 30 P.3d at 253.) (Brackets in original.).

¹⁰ See, e.g., United States v. Rodriguez-Preciado, 399 F.3d 1118, 1128 (9th Cir. 2005) ("The Supreme Court has eschewed per se rules mandating that a suspect be re-advised of his rights in certain fixed situations in favor of a more flexible approach focusing on the totality of the circumstances.") (Referencing Wyrick v. Fields, 459 U.S. 42, 48-49 (1982) (per curiam).); United States v. Pruden, 398 F.3d 241, 246-47 (3d Cir. 2005) ("[T]he question whether a time lapse renders Miranda warnings 'stale' may be reduced to answering two questions: (1) At the time the Miranda warnings were provided, did the defendant know and understand his rights? (2) Did anything occur between the warnings and the statement, whether the passage of time or other intervening event, which rendered the defendant unable to consider fully and properly the effect of an exercise or waiver of those rights before making a statement to law enforcement officers?") (Citing United States v. Vasquez, 889 F. Supp. 171, 177 (M.D. Pa. 1995).).

to execute the search warrant on his person on October 7, 2003,¹¹ and (c) Macomber's fifth amendment right to counsel was not violated insofar as the police did not engage in substantive questioning until he changed his mind and waived his constitutional rights.¹² Therefore,

IT IS HEREBY ORDERED that the circuit court's April 26, 2005 judgment is affirmed.

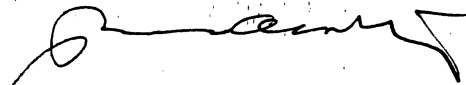
DATED: Honolulu, Hawai'i, November 13, 2006.

On the briefs:

Brian J. De Lima,
of Crudele & De Lima
for defendant-appellant
Bobby Laioha Macomber



Cynthia T. Tai,
Deputy Prosecuting Attorney,
for plaintiff-appellee
State of Hawai'i



James E. Duggan, Jr.

¹¹ See HRAP Rule 28(b)(7) (2005) ("Points not argued may be deemed waived.").

¹² See Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) ("We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.") (Emphasis added.); State v. Wallace, 105 Hawai'i 131, 142, 94 P.3d 1275, 1286 (2004) ("In other words, once an accused has expressed his desire to deal with police interrogators only through counsel, he cannot be further questioned until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police.") (Citations omitted.).