

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

In my view, this case should be decided based on the way in which it was litigated by the parties. The parties litigated this case on the basis that Defendant-Appellant Lloyd Pratt (Pratt) had satisfied the three factors set forth by the Hawai'i Supreme Court in State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998), including that Pratt had met his burden of demonstrating that he was engaged in customary or traditional native Hawaiian practices that fell within the scope of Article XII, section 7 of the Hawai'i Constitution. With respect to Pratt's claim of constitutional privilege, the only issues disputed by the parties in the trial court and on appeal are: 1) whether in addition to the Hanapi factors, a balancing of interests should be considered in determining whether Pratt's charged conduct was constitutionally protected and exempt from prosecution; and 2) how that balancing of interests should be resolved in this case.

I agree with the lead and concurring opinions that a defendant's satisfaction of the three Hanapi factors is not sufficient to establish that his or her conduct is constitutionally protected and exempt from prosecution. I also agree that it is the reasonable exercise of customary and traditional native Hawaiian practices that is constitutionally protected and that the trial court was entitled to consider a balancing of interests in evaluating Pratt's claim of constitutional privilege. On these points, I concur in the analysis of the lead and concurring opinions.

However, I do not agree that the trial court was correct in ruling that the balance of interests weighed against Pratt and in favor of Plaintiff-Appellee State of Hawai'i (State). In my view, the evidence presented did not show that Pratt's practices resulted in any actual harm. I believe that the trial court erred in denying Pratt's claim of constitutional privilege, and I would reverse Pratt's convictions. Accordingly, I respectfully dissent from this court's decision to affirm Pratt's convictions.

I. BACKGROUND

Pratt appeals from three Judgments filed on June 16, 2006, in the District Court of the Fifth Circuit (trial court). Officers of the Department of Land and Natural Resources (DLNR) observed Pratt in closed areas of Kalalau State Park on three occasions. Pratt was cited for failing to observe and abide by the officially posted signs designating closed areas and visiting hours for Kalalau State Park, in violation of Hawai'i Administrative Rules (HAR) § 13-146-4 (1999).^{1/}

Pratt moved to dismiss the citations, arguing that he had been engaged in constitutionally protected customary and traditional native Hawaiian practices in Kalalau State Park and was thus exempt from prosecution on the citations. The trial court denied Pratt's motion. Following a bench trial on the three alleged violations, Pratt was found guilty as charged. He was sentenced to a total of 60 hours of community service.

On appeal, Pratt argues, among other things, that: 1) the trial court erred by adding a "balancing of interests" factor to the three factors identified in Hanapi in evaluating whether Pratt's conduct was exempt from prosecution; and 2) the trial court erred by ruling that the balance of interests weighed in favor of the State.

^{1/} HAR § 13-146-4 provides as follows:

§ 13-146-4 Closing of areas. (a) The board or its authorized representative may establish a reasonable schedule of visiting hours for all or portions of the premises and close or restrict the public use of all or any portion thereof, when necessary for the protection of the area or the safety and welfare of persons or property, by the posting of appropriate signs indicating the extent and scope of closure. All persons shall observe and abide by the officially posted signs designating closed areas and visiting hours.

(b) Vehicles left unattended in closed areas may be impounded by the board or its authorized representative at any time.

(c) All impounded vehicles shall be towed to a place of storage. Towing, storage and other related 13-146-7 costs shall be assessed pursuant to section 290-11, HRS [(Hawaii Revised Statutes)].

A.

DLNR Officers cited Pratt on three separate occasions for violating HAR § 13-146-4. On each occasion, Pratt was present in an area of Kalalau State Park that was closed and was found camping in that area. Signs were posted stating that the area was closed. Pratt saw the signs and had actual knowledge that the area in which he was camping was a closed area. Pratt did not have a permit to camp in Kalalau State Park during the times he was cited.

B.

Pratt moved to dismiss the citations on the ground that he was exempt from prosecution for the alleged violations of HAR § 13-146-4 because his activities in Kalalau State Park were constitutionally protected as customary and traditional native Hawaiian practices. In support of his motion, Pratt asserted that

[Pratt] is native Hawaiian, and a "kahu" or religious practitioner. [Pratt] is licensed in the State of Hawai'i to perform marriages. As part of his traditional practice, and his role as a "hoa'aina", or caretaker of the land, [Pratt] travels to Kalalau Valley on the North Shore of Kaua'i to tend to the heiau in the Valley, perform cultural ceremonies, clean and repair the ancient terraces, and replant native flora species.

(Citations omitted.) Pratt stated that on each of the dates he was cited, he was present in Kalalau Valley to fulfill his responsibilities as kahu and hoa'aina.

The trial court held an evidentiary hearing on Pratt's motion to dismiss. At the hearing, Pratt presented evidence that he is a native Hawaiian, including a genealogy chart registered with the Department of Hawaiian Home Lands, which extended back three generations on his father's side and two generations on his mother's side. Although the name Kupihea does not appear on the chart, it was Pratt's unchallenged testimony that the Kupihea family, who held property in the Kalalau ahupua'a and resided in Kalalau Valley, was part of his family line on his father's side. Pratt testified that the area where he spends time in Kalalau

Valley, and where he was cited, is at or near where the Kupihea family held property and where his ancestors are buried.

Pratt stated that he was exposed as a child to traditional and customary native Hawaiian practices by growing up with Hawaiians from Ni'ihau and that as an adult, he was taught such practices by traditional and customary native Hawaiian practitioners on Kaua'i. Pratt testified that he is a "kahu"^{2/} or religious practitioner and that as part of what he feels is his cultural and traditional obligation as a kahu, he would travel periodically to Kalalau Valley to clean and tend to the heiau there. Pratt stated that he has been going into Kalalau Valley for thirty-seven years;^{3/} he has not seen any other kahu performing the type of work he was doing in Kalalau Valley. Pratt testified that he cleared overgrown bushes and rubbish left by campers from the heiau; that it takes eight to ten hours to hike to the heiau and two days for him to recuperate from the hike; and that he planted bananas, coconut trees, and other traditional plants for subsistence.

Pratt called Davianna McGregor, Ph.D., (Dr. McGregor), a professor of ethnic studies at the University of Hawai'i at Manoa, as an expert witness. Dr. McGregor has done extensive research on native Hawaiian customs and traditions, and she has developed criteria for evaluating whether a person is engaged in customary and traditional native Hawaiian practices. Dr. McGregor testified that in her opinion, Pratt was "engaging in traditional and customary native Hawaiian customs and practices related to subsistence and cultural and religious purposes" while in Kalalau Valley.

^{2/}"Kahu" is defined as "[h]onored attendant, guardian, nurse, keeper of 'unihipili bones, regent, keeper, administrator, warden, caretaker, master, mistress; pastor, minister, reverend, or preacher of a church[.]" M. Pukui & S. Elbert, Hawaiian Dictionary 113 (1986).

^{3/} It is unclear from the record whether Pratt asserts that he was tending to the heiau during the entire thirty-seven year period.

The State called Wayne Souza (Souza), the DLNR Parks District Superintendent for Kaua'i. Souza testified that the purpose of the regulation establishing closed areas and visiting hours is to protect property and the health, safety, and welfare of the public. There is a similar purpose for the camping regulations, which require a permit for camping and thereby limit the number of people in the park. Souza testified that with respect to Kalalau State Park, excess sewage is the DLNR's most important concern. In the past, the self-composting toilets in Kalalau State Park have failed because they have a limited capacity and too many people were in the park. Souza also noted that the DLNR tries to keep Kalalau State Park "low density so people can have a wilderness type of experience." The DLNR has a curatorship program, where people interested in preserving heiau can apply to the DLNR to perform such work in state parks. Souza, however, was not familiar with the specific protocols and requirements for the curatorship program.

C.

At the conclusion of the evidentiary hearing on Pratt's motion to dismiss, the trial court directed the parties to submit post-hearing briefs for it to consider before ruling on the motion. In its post-hearing brief, the State conceded that "based on Dr. Davianna Pomaikai McGregor's testimony, the State does not dispute that the activities described [(i.e., Pratt's actions in Kalalau State Park)] are traditional and customary Native Hawaiian practices." However, the State argued that the exercise of traditional and customary native Hawaiian practices was subject to government regulation and that in this case, the State was entitled to enforce its regulations against Pratt.

The trial court denied Pratt's motion to dismiss by a written decision and order. The trial court determined that Pratt satisfied the three factors identified in Hanapi, stating that "[i]t is undisputed, based on the testimony elicited at the [evidentiary] hearing and concessions made by the State in its brief, that Mr. Pratt is [1] a native Hawaiian, [2] that he

carried out customary or traditional native Hawaiian practices in Kalalau, and [3] that this exercise of rights occurred on undeveloped or less than fully developed land." (Numerical brackets in original.) The trial court, however, concluded that even with such a showing, case and statutory law all suggest that the court must "accommodate competing interests and only uphold such rights and privileges reasonably exercised and to the extent feasible and subject to the right of the State to regulate such rights." (Internal quotation marks, ellipsis points, and citations omitted.)

The trial court found that Pratt had set up a "residence" in Kalalau Valley; had cleared large areas, some of which were at ancient heiau sites; and had planted food gardens, which included bananas, taro, and coco palms, using a garden hose for watering. It cited Souza's testimony that controlling access to Kalalau State Park through regulations was necessary to protect the area, conserve park resources, and provide for the health and safety of visitors, with sewage being the DLNR's number one concern. The trial court raised the question of whether allowing Pratt's conduct would result in a whole community being created in Kalalau State Park. It also noted that applying for a camping permit or the curatorship program provided a potential means for Pratt to engage in traditional native Hawaiian practices without violating the DLNR's regulations.

The trial court determined that the State's interest in protecting and preserving its valuable asset in Kalalau State Park, when balanced against the rights expounded by Pratt, weighed in favor of the State. It therefore denied Pratt's motion to dismiss.

D.

After the trial court denied Pratt's motion to dismiss, the parties agreed to a trial on stipulated facts and the testimony presented on the motion to dismiss. At the conclusion of the trial, Pratt was found guilty as charged on all three

violations. The trial court subsequently filed written "Findings of Fact and Conclusions of Law." In its findings of fact, the trial court repeated its determination that "[b]ased on the testimony elicited at the [evidentiary] hearing and concessions made by the State in its brief, the Court finds that Mr. Pratt is [1] a native Hawaiian, [2] that he carried out customary or traditional native Hawaiian practices in Kalalau at the time of the camping, and [3] that this exercise of rights occurred on undeveloped or less than fully developed land." (Numerical brackets in original.) The trial court concluded that although Pratt satisfied the three Hanapi factors, a balancing of interests revealed that the State's interests in protecting and preserving Kalalau State Park outweighed the rights expounded by Pratt.

II. DISCUSSION

A.

The record contains uncontested testimony that Pratt's ancestors held property, resided, and were buried in Kalalau Valley near the area where Pratt was cited for being illegally present; that Pratt is a kahu and had been going into Kalalau State Park for thirty-seven years; that as a kahu, Pratt cleaned and tended to the heiau in Kalalau State Park; and that while in Kalalau State Park, Pratt carried out customary and traditional native Hawaiian practices.

In particular, the State did not present any evidence to dispute Dr. McGregor's testimony and did not challenge Pratt's claim that he was engaging in traditional and customary native Hawaiian practices while in Kalalau State Park. Indeed, after hearing Dr. McGregor's testimony, the State conceded that Pratt's actions in Kalalau State Park constituted traditional and customary native Hawaiian practices. Pratt also presented undisputed evidence that he is a native Hawaiian and that his activities took place on undeveloped land in Kalalau State Park.

Based on the undisputed evidence and the State's concessions, the trial court made findings regarding the three

Hanapi factors and concluded that Pratt satisfied the Hanapi factors. The State does not challenge the trial court's ruling on the Hanapi factors on appeal.

In my view, by its actions in the trial court and on appeal, the State abandoned or waived any claim that Pratt failed to satisfy the three Hanapi factors. See State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) (stating the general rule that if a party fails to raise an argument at trial, that argument will be deemed to be waived on appeal); State v. Harada, 98 Hawai'i 18, 30, 41 P.3d 174, 186 (2002) (concluding that the prosecution failed to properly preserve its exigent circumstances claim and thus waived it); State v. Anger, 105 Hawai'i 423, 432-33, 98 P.3d 630, 639-40 (2004) (applying the doctrine of judicial estoppel in declining to address an argument by the prosecution-appellee that was inconsistent with the position the prosecution had taken in the trial court); State v. Steelman, 93 S.W.3d 102, 106-07 (Tex. Crim. App. 2002) (en banc) (declining to address constitutional argument abandoned by the parties). Thus, this court need not address whether Pratt satisfied the Hanapi factors, but should decide this appeal based upon the position taken by both parties in the trial court, namely, that Pratt had satisfied the three Hanapi factors.^{4/}

B.

Pratt asserts that his satisfaction of the three Hanapi factors was sufficient to establish that the conduct for which he was cited was constitutionally protected and exempt from prosecution, as a matter of law. He therefore argues that the trial court erred by adding a "balancing of interests" factor to the three Hanapi factors in evaluating whether Pratt was exempt from prosecution. I join my colleagues in concluding that Pratt's satisfaction of the Hanapi factors did not per se establish that he was exempt from prosecution.

^{4/} At oral argument, the State acknowledged that it had conceded that Pratt had satisfied the Hanapi factors, and it acknowledged that Pratt and the trial court were entitled to rely on this concession.

1.

In Hanapi, the defendant, a native Hawaiian artist and cultural practitioner, was charged with criminal trespass for refusing to leave his neighbor's property. Hanapi, 89 Hawai'i at 178-79, 970 P.2d at 486-87. On the previous two days, Hanapi had entered his neighbor's property without incident to observe restoration work in fishponds adjoining Hanapi's and his neighbor's properties. Id. at 178, 970 P.2d at 486. On the third day, Hanapi was told not to enter the neighbor's property, ignored that warning, and was arrested when he refused to leave. Id. Hanapi maintained that for generations, his family and ancestors practiced traditional native Hawaiian religious, gathering, and sustenance activities in and around the fishponds. Id. Hanapi claimed that when he was arrested for trespass, he was exercising his constitutionally protected rights as a native Hawaiian. Id. at 185, 970 P.2d at 493. Hanapi asserted that he was on the neighbor's property to perform religious and traditional ceremonies of healing the land and to ensure that the fishponds were restored properly by his neighbor. Id.

The Hawai'i Supreme Court held that Hanapi had the burden of demonstrating that his activities were constitutionally protected. The court noted that "[w]hen a criminal defendant claims to have been engaged in a constitutionally protected activity, the burden is placed on him or her to show that his or her conduct fell within the prophylactic scope of the constitution's provision." Id. at 183, 970 P.2d at 491. The court held that "it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected." Id. at 184, 970 P.2d at 492.

In discussing the development of the law, the supreme court emphasized that it was the reasonable exercise of customary and traditional native Hawaiian practices that is constitutionally protected.

This court has consistently recognized that "the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7." Public Access

Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 442, 903 P.2d 1246, 1263 (1995) (hereinafter "PASH") (emphasis in original). See also Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982) (recognizing Hawai'i's constitutional mandate to protect traditional and customary native Hawaiian rights); Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992) (upholding the "Kalipi rights" defining the "rudiments of native Hawaiian rights protected by article XII, § 7" of the Hawai'i Constitution). In PASH, we further examined the legal developments of land tenure in Hawai'i and concluded that "the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property." Id.

Although PASH did not discuss the precise nature of Hawaii's "limited property interest," one limitation would be that constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes.

Id. at 184, 970 P.2d at 492 (emphasis in original).

The court then identified three factors that a defendant, "at minimum," must show "[i]n order . . . to establish that his or her conduct is constitutionally protected as a native Hawaiian right" Id. at 185-86, 970 P.2d at 493-94 (emphasis added). "First, he or she must qualify as a 'native Hawaiian' within the guidelines set out in PASH." Id. at 186, 970 P.2d at 494. The court noted that in Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 903 P.2d 1246 (1995) (PASH), it stated that "'those persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778,' and who assert otherwise valid customary and traditional Hawaiian rights are entitled to constitutional protection regardless of their blood quantum.'" Id. at 186, 970 P.2d at 494 (quoting PASH, 79 Hawai'i at 449, 903 P.2d at 1270) (brackets omitted; emphasis in original).

"Second, once a defendant qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice." Id. at 186, 970 P.2d at 494.

"[Third], a defendant claiming his or her conduct is constitutionally protected must also prove that the exercise of the right occurred on undeveloped or 'less than fully developed

property.'" Id. (citation omitted). The court clarified PASH by holding that "if property is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property." Id. at 186-87, 970 P.2d at 494-95 (footnote omitted; emphasis in original). The court stated that "[i]n accordance with PASH, however, we reserve the question as to the status of native Hawaiian rights on property that is 'less than fully developed.'" Id. at 187, 970 P.2d at 495 (citation omitted).

The supreme court held that Hanapi failed to satisfy the second factor because he did not adduce sufficient evidence to prove "that his conduct, at the time of his arrest, represented the exercise of a traditional or customary native Hawaiian right" Id. at 187, 970 P.2d at 495. The supreme court therefore concluded that the trial court had properly rejected Hanapi's claim of constitutional privilege. Id.

2.

Contrary to Pratt's claim, Hanapi did not establish a per se rule that satisfaction of the three Hanapi factors means that a defendant's conduct is constitutionally protected and exempt from prosecution. Instead, Hanapi made clear that the three factors were the minimum a defendant had to show in support of a claim that his or her conduct was constitutionally protected as a native Hawaiian right and exempt from prosecution. In discussing the third factor -- that the defendant's claimed constitutionally protected conduct occurred on undeveloped or less than fully developed property -- the supreme court specifically "reserve[d] the question as to the status of native Hawaiian rights on property that is 'less than fully developed.'" Id. (citation omitted). There would be no need to reserve that question if satisfying the three factors automatically meant that

a defendant's conduct was constitutionally protected and exempt from prosecution.

As noted in my colleague's lead opinion, the supreme court emphasized in Hanapi that it was the reasonable exercise of customary and traditional native Hawaiian practices that was entitled to protection under the Hawai'i Constitution. The reasonableness requirement is also implicit in article XII, § 7 of the Hawai'i Constitution:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

(Emphasis added).

As specified in Hanapi, satisfying the three Hanapi factors (the minimum a defendant must show) was a necessary but not a sufficient condition that Pratt was required to meet in order to demonstrate that his conduct was constitutionally protected and exempt from prosecution for violating the DLNR regulation. Accordingly, the trial court was not required to dismiss the charges against Pratt based solely on its finding that he had satisfied the three Hanapi factors. The trial court's consideration of a balancing of interests was relevant to whether Pratt's exercise of customary and traditional native Hawaiian practices was reasonable. I therefore join my colleagues in concluding that the trial court did not err in considering a balancing of interests in evaluating whether Pratt had met his burden of establishing that his conduct was constitutionally protected and exempt from prosecution for violating the DLNR regulation.^{5/}

^{5/} I also reject Pratt's claims that by adding a balancing of interests factor to the three Hanapi factors, the trial court violated the principle of stare decisis, the ex post facto clause, and the rule of lenity. As noted, the trial court's use of a balancing of interests factor was fully consistent with and supported by Hanapi. Thus, the trial court did not violate the principle of stare decisis or the ex post facto clause, even assuming *arguendo* that the ex post facto prohibition applies to judicial decisions. The trial

(continued...)

C.

Pratt argues that even if the trial court is allowed to apply a balancing test in addition to the Hanapi factors, the trial court erred in ruling that the balance of interests weighed in favor of the State and against Pratt. I agree with Pratt.

"[T]he State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." PASH, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43. The Hawai'i Supreme Court has "upheld the rights of native Hawaiians to enter undeveloped lands owned by others to practice continually exercised access and gathering rights necessary for subsistence, cultural or religious purposes so long as no actual harm was done by the practice." Pele Defense Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992). Thus, in analyzing the balance of interests between Pratt and the State and whether Pratt's exercise of traditional and customary native Hawaiian practices in Kalalau State Park was reasonable, we must look to whether Pratt's conduct resulted in actual harm.

The State asserted that its primary concern, which was addressed by the regulation Pratt was cited for violating, was excess sewage. However, there was no evidence presented that Pratt's presence in closed areas of Kalalau State Park had caused or contributed to an excess sewage problem. Indeed, the State did not offer any substantial evidence that Pratt's activities in Kalalau State Park had done any actual harm. Although the trial court raised the question of whether permitting Pratt's conduct might result in the creation of a whole community in Kalalau State Park, Pratt testified, without contradiction, that he had

^{5/}(...continued)
court's application of a balancing of interests factor did not involve an interpretation of an ambiguous criminal statute, see State v. Kalani, 108 Hawai'i 279, 288, 118 P.3d 1222, 1231 (2005), but rather the straightforward interpretation of Hanapi. The trial court's consideration of a balancing of interests did not violate the rule of lenity.

not seen any other kahu performing the type of work he was performing in Kalalau State Park.^{6/}

Based on the State's concessions and the evidence presented in this case, I conclude that the trial court erred in ruling that the balance of interests weighed against Pratt and in denying Pratt's claim of constitutional privilege. Accordingly, I would reverse Pratt's convictions.

Craig H. Nakamura

^{6/} The State also presented evidence that the DLNR has a curatorship program. However, Souza, the State's only witness, testified that he was not familiar with the specific protocols and requirements for the program. Thus, based on the evidence presented, the impact that such a program might have on the reasonableness of Pratt's conduct is speculative. The trial court suggested that Pratt could have applied for a camping permit. However, no evidence was presented regarding the availability of such permits or whether Pratt's asserted purpose to engage in customary and traditional native Hawaiian practices would be considered.