IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellant,

vs.

TANYA RAPOZO, aka Tanya Rapoza,
Petitioner/Defendant-Appellee.

NO. 29215

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 07-01-0760)

JULY 29, 2010

MOON, C.J., NAKAYAMA, AND RECKTENWALD, JJ.;
AND ACOBA, J., DISSENTING, WITH WHOM DUFFY, J., JOINS

OPINION OF THE COURT BY RECKTENWALD, J.

In the early morning of September 19, 2006, Petitioner/Defendant-Appellee Tanya Rapozo, a.k.a. Tanya Rapoza was stopped by police for driving erratically on Ala Wai Boulevard in Waikiki. She was subsequently placed under arrest and transported to the Honolulu Police Department's main station, where she was searched. During that search, a police matron discovered a .38 caliber bullet inside Rapozo's brassiere. The bullet was later tested and determined to be operable.

Rapozo, who was a convicted felon, was charged with Ownership or Possession Prohibited of Any Firearm or Ammunition By a Person Convicted of Certain Crimes in violation of Hawaiʻi Revised Statutes (HRS) § 134-7(b) and (h) (Supp. 2007), cited

infra. Rapozo filed a motion to dismiss that charge as a de minimis infraction within the meaning of HRS § 702-236 (1993).[1] In support of her motion, Rapozo submitted a declaration of counsel which asserted that her explanation for possessing the bullet was that "she was going to have it made into a charm for a bracelet." The Circuit Court of the First Circuit granted the motion.[2] However, the Intermediate Court of Appeals vacated the dismissal, and Rapozo timely filed an application for a writ of certiorari with this court.

In her application, Rapozo raises the following question:

> Whether the ICA gravely erred in concluding that the trial court abused its discretion in dismissing the case under H.R.S. 702-236 the de minimus statute.

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[1] HRS § 702-236 (1993) provides:

> **De minimis infractions.** (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or
>
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
>
> (2) The court shall not dismiss a prosecution under subsection (1)(c) of this section without filing a written statement of its reasons.

[2] The Honorable Michael A. Town presided.

We have recognized previously that it is the defendant's burden to place "all" of the relevant attendant circumstances before the trial court, and to establish why dismissal is warranted in light of those circumstances. See, e.g., State v. Park, 55 Haw. 610, 616, 525 P.2d 586, 591 (1974); State v. Viernes, 92 Hawaiʻi 130, 134, 988 P.2d 195, 199 (1999) (quoting State v. Vance, 61 Haw. 291, 307, 602 P.2d 933, 944 (1979)). The only evidence offered by Rapozo in support of her motion was the declaration of her counsel, which omitted many of the relevant attendant circumstances. We therefore conclude that Rapozo failed to carry her burden of establishing that her conduct was de minimis within the meaning of HRS § 702-236. However, as we set forth below, we do not preclude the possibility that Rapozo could carry that burden at a later stage of the proceedings in the event a more fully developed record supports dismissal. See infra note 16.

Accordingly, we affirm the judgment of the ICA.

I. Background

A. Factual and Procedural Background

On April 24, 2007, Rapozo was charged in an indictment with Ownership or Possession Prohibited of Any Firearm or Ammunition By a Person Convicted of Certain Crimes in violation of HRS § 134-7(b) and (h)[3] (Count I), and driving without a

[3] At the time of the charged offense, HRS § 134-7 (Supp. 2007) provided, in relevant part:

(continued...)

license in violation of HRS § 286-102 (Count II).

On February 26, 2008, Rapozo filed a motion to dismiss Count I of the indictment as de minimis within the meaning of HRS § 702-236. Rapozo also submitted a Declaration of Counsel (declaration) and a memorandum in support of the motion. Rapozo's counsel declared, in relevant part, as follows:

> . . .
> 2. The allegations in this matter are as follows:
> a) At approximately 1:14 a.m. on September 19, 2006, Ms. Rapozo was driving a white pickup truck on Ala Wai Boulevard in the City and County of Honolulu, State of Hawaii, when she was pulled over by Honolulu police officer Jason Pistor for driving erratically.
> b) After making the stop, Officer Pistor examined the VIN number on the pickup truck and radioed that number to HPD dispatcher.
> c) Dispatch found that the VIN number belong [sic] to another vehicle and notified Officer Pistor of that fact.
> d) Officer Pistor then placed the defendant under arrest for driving under the influence and without a valid driver's license and took her to the Central Processing Division at the main station.
> 3. At approximately 2:30 a.m. Ms. Rapozo was given a pat down search by Police Matron Laura Chin [sic] who felt something hard in defendant's brassrere [sic].

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[3](...continued)

Ownership or possession prohibited, when; penalty.

> . . .
> (b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.
> . . .
> (h) Any person violating subsection (a) or (b) shall be guilty of a class C felony; provided that any felon violating subsection (b) shall be guilty of a class B felony. Any person violating subsection (c), (d), (e), (f), or (g) shall be guilty of a misdemeanor.

4. Matron Chun escorted Ms. Rapozo into the holding cell to conduct a more extensive search and found a single .38 caliber bullet in the left cup of defendant's bra.
5. Ms. Rapozo's explanation for having the bullet in her possession was that she was going to have it made into a charm for a bracelet.
6. No gun was found by either Matron Chun or police officer Pistor, nor was any other ammunition, drugs or other contraband found in defendant's possession or control.

. . .

Rapozo argued that "under the relevant circumstances, the finding of a single 38 caliber bullet in her bra did not actually cause or threaten the harm sought to be prevented or did so only to the extent too trivial to warrant the condemnation of conviction."

On March 3, 2008, the State filed a memorandum in opposition to Rapozo's motion to dismiss. In its memorandum, the State recited facts which were similar to those recited by Rapozo's counsel, but with some additional detail. The State's memorandum asserted that, at the time of the traffic stop, Rapozo's "eyes were red and bloodshot," she "made statements and questions that did not make any sense," and "her behavior was bizarre to police officers." The State's memorandum also stated that "[Rapozo] had previously been convicted of Unauthorized Control of Propelled Vehicle, Promoting a Dangerous Drug in the Third Degree and Theft in the Second Degree."

The State argued that the "direct and unambiguous language" of HRS § 134-7(b) clearly prohibits a felon from owning, possessing or controlling any firearm or ammunition. The

State further argued that applying the de minimis provision to a single bullet, as Rapozo advocated, would render the statute's prohibition against the possession of "any" ammunition superfluous. Moreover, the State noted that, at the time the bullet was recovered, Rapozo was in custody in the main police station holding facility, and Rapozo made no effort to turn the bullet over to police officers. The State argued that, although Rapozo was not found in possession of a gun or other firing device, the possession of a single bullet was not de minimis because "[a] bullet can be fired from a simple device that can be obtained/made by any one. For example, any home made gun such as a 'zip gun,' typically made by prisoners can fire a 'bullet' and cause the same harm."

The circuit court held a hearing on May 7, 2008. At the start of the hearing, the circuit court asked Rapozo's counsel whether he wished to argue the motion, and stated, "I've read over the motions. I'll take judicial notice." Neither the State nor Rapozo's counsel voiced any objection.

Rapozo's counsel argued the motion, but Rapozo did not testify at the hearing, nor did she present any other evidence. Rapozo's counsel argued that "the question raised by this motion [is] . . . whether or not a possession of a single bullet in her bra, without the ability to fire it, violates the purpose of HRS [§] 134-7(b)." Rapozo's counsel further argued that:

> Under the facts of this case, a single bullet hidden in the Defendant's bra that could not be used

> to harm anyone doesn't really violate the purpose of the statute; nor does it create the danger that the statute was designed to prevent.
>
> I think the Court should look at the attendant circumstances of this case and not fantasize about the presence of a gun, if the State intends to muddy the water by raising this specter of an imaginary Zip gun. There was no .38 caliber pistol, no Zip gun, or any other mechanism present at the time capable of firing that bullet.

After Rapozo's counsel concluded his argument, the circuit court addressed the Deputy Prosecuting Attorney (DPA) and stated:

> Miss Ikeda, I also thoroughly understand what you said [in the State's memorandum in opposition to Rapozo's motion]. A bullet is a bullet. She's a felon, and that a felon should not get anywhere near a bullet or a piece of ammunition. It could have been smuggled into the facility and then you put a picture of a so-called Zip gun or whatever.

The circuit court then questioned the DPA concerning two photographs of homemade zip guns that were attached to the State's memorandum. The circuit court then asked the DPA whether she wished to add or emphasize anything for the record. The DPA declined, stating "[n]o, Your Honor. I believe it's all stated in my motion."

The circuit court did not rule at the hearing, and took the matter under advisement. On June 3, 2008, the circuit court filed its Order Granting Defendant's Motion to Dismiss Count I of Felony Indictment with Prejudice, which contained its Findings of Fact and Conclusions of Law (FOF/COL).

The circuit court's relevant FOFs/COLs were as follows:

FINDINGS OF FACT

> 1. At approximately 1:14 a.m. on September 19, 2006, Tanaya [sic] Rapozo was driving a white

pickup truck on Ala Wai Boulevard in the City and County of Honolulu, State of Hawaii, when she was pulled over by Honolulu Police Officer Jason Pistor for driving erratically.

. . .

3. Officer Pistor then placed the defendant under arrest for driving under the influence and without a driver's license and took her to the Central Processing Desk of the main police station.

4. At approximately 2:30 a.m. Ms. Rapozo was given a pat down search by police matron Laura Chun who felt something hard in defendant's brassiere.

5. Matron Chun escorted Ms. Rapozo into the holding cell to conduct a more extensive preincarceration search and found a single .38 caliber operable bullet in the left cup of defendant's bra.

6. Ms. Rapozo's explanation for possessing the bullet was that she was going to have it made into a charm for a bracelet.

7. No gun was found by either Matron Chun or police officer Pistor, nor was any other ammunition, drugs or other contraband found in defendant's possession or control.

8. Defendant, who has previously been convicted of Unauthorized Control of Propelled Vehicle, Promoting Dangerous Drugs in the Second Degree and Theft in the Second Degree and is prohibited from possessing or controlling a firearm and/or ammunition, was arrested and charged under HRS § 134-7(b), a class B felony.[4]

CONCLUSIONS OF LAW

1. The purpose of HRS § 134-7(b) and (h) is to

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[4] Aside from FOFs 5 and 6, the circuit court's FOFs were unchallenged by the State, and are therefore binding on this court. See Kelly v. 1250 Oceanside Partners, 111 Hawaiʻi 205, 227, 140 P.3d 985, 1007 (2006). In its Opening Brief to the ICA, the State challenged FOFs 5 and 6, insofar as they characterized the item in Rapozo's possession "as a 'bullet,' rather than as a bullet cartridge or round or simply ammunition" because "[a] bullet does not contain explosives but is the solid projectile portion of ammunition that is propelled from the firearm." In its memorandum opinion, the ICA rejected the State's contentions as unfounded because the circuit court characterized the bullet as "operable," and it was therefore "sufficient to satisfy the meaning of ammunition under HRS § 134-7(b)." Given the ICA's resolution of that issue, it does not appear that there is any further dispute that the bullet in Rapozo's possession was "ammunition" within the meaning of HRS § 134-7(b).

> protect the public from criminal activity involving the use of firearms by felons convicted of certain crimes along with people under judicial restraint by prohibiting these individuals from possessing or controlling firearms and/or ammunition. In this case, the use of firearms and/or ammunition is not a relevant factor in causing the situation that led to defendant's arrest.
>
> 2. Under HRS § 134-7(b) the possession of ammunition in any amount is a violation. (*See*, State v. Pinero, 70 Haw. 709, 778 P.2d 704 (1989)). However, the law does recognize that under certain circumstances the infraction is so small as to make the penalty for the violation of a particular statute unreasonable. HRS Section 702-236.
>
> 3. HRS Section 702-236 provides that the Court may dismiss a prosecution if, considering all of the relevant circumstances, it finds that the defendant's conduct did not actually cause or threaten the harm sought to be prevented by the law or did so only to an extent too *trivial* to warrant the condemnation of conviction. (*See*, State v. Viernes, 92 Haw. 130, 988 P.2d 185 [sic] (1999); State v. Charmichael, 99 Haw. 75, 80, 53 P.3d 214, 219 (2002)).
>
> 4. Under the facts of this case, a single bullet hidden from plain view in defendant's bra, without the capacity to fire it and which could not be used to harm anyone, does not violate the purpose of H.R.S. § 134-7(b); nor does it create the danger the statute was designed to prevent.
>
> 5. Where an infraction is so infinitesimal that the possibility of the harm sought to be prevented by a statute is minuscule, the violation may constitute a "de minimus infraction" within the meaning of HRS 702-236. State v. Viernes, 92 Hawaii 30, 988 P.2d 185 [sic] (1999). In that event the Court in its sound discretion may dismiss the prosecution brought against the defendant for the statutory violation. Id.
>
> 6. Clearly, the defendant has met her burden of showing that the de minimus statute applies. Therefore, in the interest of justice, this Court chooses to exercise the discretion provided by H.R.S. § 702-236 and the authorities cited herein, to dismiss Count I of the indictment with prejudice.

(Emphasis in original).

B. ICA Appeal

In its October 29, 2008 Opening Brief to the ICA, the State raised the following three points of error: 1) the circuit court erred in entering FOFs 5 and 6; 2) the circuit court erred in entering COLs 1, 4 and 6; and 3) the circuit court abused its discretion in granting Rapozo's motion to dismiss Count I as de minimis.[5]

Specifically, the State challenged FOFs 5 and 6 insofar as they characterized the item in Rapozo's possession as a "bullet," because "[a] bullet does not contain explosives but is the solid projectile portion of ammunition that is propelled from the firearm."

The State also argued that the circuit court erred in COL 1 because, the State argued, the protection of law enforcement officers, correctional officers, jail staff and detainees was also an important purpose of HRS § 134-7. The State further argued that Rapozo had passively attempted to bring "live" ammunition into the police station holding facility, where she or another detainee could have used a "home made" gun or found some other means of discharging the bullet, and that she could have been charged with Promoting Prison Contraband in violation of HRS § 710-1022 (1993).

The State challenged COL 4, contending that the circuit

[5] The State also pointed out that the circuit court, in FOF 8, incorrectly described one of Rapozo's prior convictions as "Promoting Dangerous Drugs in the Second Degree, which would be a class B felony . . . However, our records indicate and we believe Defendant will not contest that the conviction was for Promoting Dangerous Drugs in the Third Degree."

court erroneously concluded that the bullet "could not be used to harm anyone," since, the State argued, the bullet was operable and could have been fired from a homemade device. In addition, the State challenged the conclusion that Rapozo's possession of a single bullet "does not violate the purpose of H.R.S. § 134-7(b); nor does it create the danger the statute was designed to prevent," where Rapozo's possession of a single bullet fell within the statute's prohibition against the possession of "any" ammunition. The State further challenged the circuit court's COL 4 insofar as it characterized the item in Rapozo's possession as a bullet.

Finally, the State challenged COL 6's conclusion that Rapozo had met her burden of proof in showing that the de minimis statute applied, on the basis that she failed to adduce any evidence that the bullet was not capable of being fired or otherwise exploded.

In her answering brief, Rapozo argued that the circuit court did not abuse its discretion in dismissing the charge as de minimis, because the use of firearms and/or ammunition was not a relevant factor in the situation leading to her arrest, and because her conduct did not cause or threaten the harm sought to be prevented by HRS § 134-7.

In its April 20, 2009 memorandum opinion, the ICA rejected the State's argument concerning the circuit court's characterization of the item in Rapozo's possession as a "bullet"

as unfounded because the circuit court described the bullet as "operable," and it was therefore "sufficient to satisfy the meaning of ammunition under HRS § 134-7(b)." State v. Rapozo, No. 28215, 2009 WL 1090068 at *2 (App. Apr. 20, 2009) (mem.).

Concerning the State's challenge to COL 1, the ICA noted that the circuit court correctly concluded that the purpose of HRS § 134-7(b) was to "prevent . . . the commission of crimes by convicted felons by prohibiting their possession or control of firearms and/or ammunition." Id. at *3. However, the ICA held that the circuit court disregarded a rule or principle of law in concluding "that the use of firearms and/or ammunition was not a relevant fact in causing 'the situation' that led to Rapozo's arrest," because "the situation" leading to her arrest on Count I of the felony indictment was her possession of the bullet. Id. The ICA further concluded that:

> The statute does not require proof that the convicted felon used or was about to use the firearm or ammunition. The statute was based on the premise that a felon's possession of a firearm or ammunition "gives rise to a reasonable apprehension that such person might use such firearms [or ammunition] for criminal and violent purposes." See 1968 Haw. Sess. Laws, Act 19, [§ 1 at 23] . . . . The court disregarded this principle of law when it based its finding on the absence of evidence that the ammunition was used or about to be used.

Id.

Similarly, the ICA concluded that the circuit court erred in COLs 4 and 6 because "[t]he circumstances of this case, i.e., that there was only one bullet, it was hidden in Rapozo's bra, and Rapozo did not also possess a firearm or other means of

firing the bullet, do not negate the public safety purpose of the clear statutory mandate that convicted felons are not allowed to possess any firearms or ammunition." Id.

The ICA distinguished the possession of a single bullet from the possession of 0.001 grams of methamphetamine, which this court addressed in State v. Viernes, 92 Hawaiʻi 130, 988 P.2d 195 (1999) (affirming the trial court's dismissal of the charge of promoting a dangerous drug in the third degree as de minimis). Rapozo, 2009 WL 1090068 at *4. The ICA concluded that, unlike 0.001 grams of methamphetamine, which "would not cause a physiological effect on a human body and was not of a saleable amount . . . [i]t is without question that one live .38 caliber bullet is exactly the sort of ammunition that could kill or seriously injure a human being." Id.

The ICA further concluded that Rapozo failed to meet her burden of proof in showing that the de minimis statute applied because her proffered explanation for her possession of the bullet, i.e., that she intended to use it as a charm for a bracelet, was "better characterized as a defense of justification. . . . Assertion of a justification defense should be made and considered by the trier-of-fact at trial." Id.

Finally, the ICA held that the circuit court abused its discretion in granting Rapozo's motion to dismiss the charge as de minimis. Id.

On June 5, 2009, the ICA entered its Judgment on Appeal.

On September 1, 2009, Rapozo timely petitioned this court for a writ of certiorari to review the ICA's June 5, 2009 judgment. The State did not file a response.

II. Standards of Review

A. De Minimis Infraction

"The dismissal of a prosecution for a de minimis infraction . . . is not a defense. The authority to dismiss a prosecution [as de minimis] rests in the sound discretion of the trial court." Viernes, 92 Hawaiʻi at 133, 988 P.2d at 198 (quoting State v. Ornellas, 79 Hawaiʻi 418, 420, 903 P.2d 723, 725 (App. 1995)). "A court abuses its discretion if it clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Oughterson, 99 Hawaiʻi 244, 253, 54 P.3d 415, 424 (2002) (quoting State v. Balanza, 93 Hawaiʻi 279, 283, 1 P.3d 281, 285 (2000)) (internal quotation marks and brackets omitted).

B. Findings of Fact and Conclusions of Law

A circuit court's findings of fact and conclusions of law are reviewed as follows:

> [A] trial court's findings of fact are subject to the clearly erroneous standard of review. A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with a definite and firm conviction that a mistake has been committed.
>
> A conclusion of law is not binding upon an appellate court and is freely reviewable for its correctness. This court ordinarily reviews conclusions of law under the right/wrong standard. Thus, a conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be

> overturned. However, 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 upon the facts and circumstances of each individual case.

State v. Gabalis, 83 Hawaiʻi 40, 46, 924 P.2d 534, 540 (1996) (citations, internal quotation marks, brackets and ellipses omitted).

III. Discussion

Rapozo's possession of a single operable bullet is within the scope of HRS § 134-7(b)'s clear prohibition against her possessing "any . . . ammunition." Nevertheless, her conduct may still constitute a de minimis infraction under HRS § 702-236(1)(b) if it "did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense," see Viernes, 92 Hawaiʻi at 134, 988 P.2d at 199, or did so to an extent "too trivial to warrant the condemnation of conviction," see State v. Akina, 73 Haw. 75, 77, 828 P.2d 269, 271 (1992).

We begin our analysis by examining the history of Hawaii's de minimus statute and the principles applicable to deciding motions under the statute. We then examine the purpose of HRS § 134-7(b). Finally, we consider whether Rapozo's conduct caused or threatened the harm sought to be prevented by the statute, or whether it did so only to a trivial extent.

We note that although we reach the same result as the ICA, we diverge from its analysis in several respects. For example, the ICA concluded that the circuit court erred in

observing that "the use of firearms and/or ammunition was not a relevant fact in causing 'the situation' that led to Rapozo's arrest," and for relying on the fact that no firearm was recovered from Rapozo at the time of her arrest. However, when the FOF/COL are read in their entirety, it is apparent that the circuit court did not misapprehend the law; rather, the circuit court viewed the circumstances under which Rapozo initially came to the attention of police, and the fact that no firearms were recovered from her, as mitigating factors in assessing the extent of Rapozo's culpability. As we discuss below, the court must take the nature of the conduct alleged and the nature of the attendant circumstances into account. Thus, we cannot say that, as a matter of law, it was improper for the circuit court to take those factors into consideration.

The ICA also concluded that Rapozo's explanation for possessing the bullet "is better characterized as a defense of justification as to her possession." However, as we discuss below, Rapozo was required to address the nature of her conduct and the attendant circumstances in order to meet her burden of establishing that her conduct constituted a de minimis infraction. Thus, Rapozo's explanation is relevant to the determination of whether she has carried that burden, and it was therefore appropriate for the circuit court to consider it.

A. General principles applicable to determining motions brought under HRS § 702-236

Hawaii's de minimis statute was adopted in 1972, and was based on section 2.12 of the 1962 version of the Model Penal Code. 1972 Haw. Sess. Laws Act 9, § 1 at 50-51; Commentary to HRS § 702-236.[6] With one exception,[7] Hawaiʻi adopted the MPC provision in its entirety. The explanatory note to the MPC explains that "[s]ection 2.12 authorizes courts to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law." 1 American Law Institute, Model Penal Code and Commentaries § 2.12 at 399 (1962). The comment to section 2.12 notes that "[t]he purpose of this section of the Code is to recognize the propriety of judicial discretion of this sort, and at the same time set forth the basis upon which it can reasonably be used[,]" id. at 402 (footnote omitted), and adds that "[a]melioration of the letter of the law is both necessary and inevitable, but at the same time should be the product of law rather than seemingly in its defiance[,]" id. at 404.

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[6] The Commentary to HRS § 702-236 states that HRS § 702-236 was patterned after § 2.13 of the MPC. However, this appears to be an error. MPC § 2.12 is the de minimis provision. 1 American Law Institute, Model Penal Code and Commentaries § 2.12 at 399.

[7] While section 2.12 of the MPC provides that a court "shall" dismiss a prosecution if it finds that the offense was de minimis, the legislature instead provided that the court "may" dismiss in such circumstances. 1972 Haw. Sess. Laws Act 9, § 1 at 50; Supplemental Commentary to HRS § 702-236 (quoting Sen. Conf. Comm. Rep. No. 2, in 1972 Senate Journal, at 741). In other words, the court can decline to dismiss a prosecution even if the de minimis statute is otherwise satisfied. The conference committee report explained that "[i]t is your [c]ommittee's intent to give the courts broad discretion in this matter." Sen. Conf. Comm. Rep. No. 2-72, in 1972 Senate Journal, at 741.

Consistent with that intent, HRS § 702-236 provides that "[t]he court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct" constituted a de minimis infraction. HRS § 702-236(1) (emphasis added). Thus, we require that all of the relevant attendant circumstances be considered by the trial court. See Viernes, 92 Hawaiʻi at 133, 988 P.2d at 198 ("before [HRS § 702-236] can be properly applied in a criminal case, all of the relevant facts bearing on the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense should be shown to the judge so that the judge may consider all of the facts on this issue") (internal citations, parenthesis and quotation marks omitted); State v. Fukagawa, 100 Hawaiʻi 498, 504, 60 P.3d 899, 905 (2002) ("Dismissing a charge without any indicators from the surrounding circumstances to demonstrate a de minimis infraction would be an abuse of discretion.").

The defendant has the burden of bringing the relevant attendant circumstances before the court for its consideration. See, e.g., State v. Oughterson, 99 Hawaiʻi at 256, 54 P.3d at 427 (2002) ("[I]nsofar as the defendant advances a motion to dismiss on de minimis grounds, it is the defendant, and not the prosecution, who bears the burden of proof on the issue.") (emphasis in original).

In addition to requiring consideration of all the

relevant attendant circumstances, HRS § 702-236 further requires consideration of "the harm or evil sought to be prevented by the law defining the offense[.]" HRS § 702-236; see State v. Akina, 73 Haw. 75, 78, 828 P.2d 269, 271 (1992); State v. Ornellas, 79 Hawaiʻi 418, 422-23, 903 P.2d 723, 727-28 (App. 1995). As with all efforts to determine legislative intent, that inquiry relies primarily on the plain language of the statute. State v. Kupihea, 98 Hawaiʻi 196, 206, 46 P.3d 498, 508 (2002) ("[O]ur duty in interpreting statutes is to give effect to the legislature's intent[,] which is obtained primarily from the language of the statute.") (citation omitted) (brackets in original); Akina, 73 Haw. at 78, 828 P.2d at 271 (applying HRS § 702-236 to a charge brought under a particular statute, and noting that "[t]his court derives legislative intent primarily from the language of [the] statute and follows the general rule that in the absence of clear legislative intent to the contrary, the plain meaning of the statute will be given effect"); Ornellas, 79 Hawaiʻi at 423, 903 P.2d at 728 (applying HRS § 702-236 to an abuse of a family member case, ICA cites Akina and notes "[a]s evidenced by the language of HRS § 709-906, the purpose of the statute is to protect household members from physical abuse"). We therefore respectfully disagree with the dissent's assertion that "the legislative intent cannot be discerned by looking directly to the language of the statute itself." Dissenting opinion at 20.

In Kupihea, the defendant was convicted of, inter alia,

prohibited acts relating to drug paraphernalia, in violation of HRS § 329-43.5(a) (1993), in relation to his possession of "a green plastic container and/or a clear plastic ziploc bag." 98 Hawaiʻi at 198, 200, 46 P.3d at 500, 502 (emphasis omitted). Kupihea argued that the circuit court erred in failing to dismiss the charge as de minimis because "the items were everyday household items not intended or designed for use as drug paraphernalia[.]" Id. at 206, 46 P.3d at 508 (brackets in the original). In support of his argument, Kupihea relied on "comments of a legislator favoring passage of HRS § 329-43.5" concerning "'head shops[,]'" and "[pipes] made for marijuana, for cocaine, for heroin, and all the assorted paraphernalia that accompany that." Id. (brackets in the original). Accordingly, Kupihea argued, "the ziploc bag and the plastic candy container did not actually threaten the harm or evil sought to be prevented by the law defining the offense, [that is], preventing the sale of items specifically designed or intended for use as drug paraphernalia." Id. (brackets in original).

In discerning the harm or evil sought to be prevented by HRS § 329-43.5, this court relied on the plain language of the statute, noting that "[w]e do not resort to legislative history to cloud a statutory text that is clear." Id. (emphasis added) (citation and quotation marks omitted). We further noted that "[o]ur duty in interpreting statutes is to give effect to the legislature's intent[,] which is obtained primarily from the

language of the statute." Id. (some brackets in original and some added) (emphasis added) (citations and quotation marks omitted).

Applying these principles to HRS § 329-43.5, we concluded that "[Kupihea's] possession involved the harm or evil sought to be prevented by HRS § 329-43.5[,]" id. at 207, 46 P.3d at 509, noting that:

> HRS § 329-43.5 states in relevant part . . . that "[i]t is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to pack, store, contain, [or] conceal a controlled substance" such as methamphetamine. Furthermore, as we have observed, HRS § 329-1 defines drug paraphernalia as including "all materials of any kind which are used in storing a controlled substance not limited to envelopes[ ] and other containers used in packaging small quantities of controlled substances." (Emphases added.) It is evident that, in enacting HRS § 329-1, the legislature cast a wide net, ensnaring not only containers that might ordinarily be thought of as used for "packaging small quantities of drugs," but anything used or possessed with the intent to use it for the proscribed purposes.

Id. at 206, 46 P.3d at 508 (ellipses omitted) (brackets in original).

Similarly, in Akina, the defendant was charged with custodial interference after assisting Sue, a ward of the State who had run away from her foster parents. 73 Haw. at 76-77, 828 P.2d at 270-71. The defendant, Sue's foster father, and the prosecutor all agreed that Akina was trying to help Sue. Id. Nevertheless, the circuit court denied Akina's motion to dismiss the charge as de minimis, reasoning that Akina's actions fell within the plain meaning of the statute and that convicting Akina would comply with legislative intent. Id. at 77, 828 P.2d at

271.

Akina argued to this court that his conduct fell within the de minimis provision because the legislative history of HRS § 707-727(1)(a), under which he was charged, "show[ed] that the statute was only intended to prevent child snatching, that is, interference of custody awarded upon divorce." Id. at 78, 828 P.2d at 271. This court disagreed, noting that "[t]his court derives legislative intent primarily from the language of statute and follows the general rule that in the absence of clear legislative intent to the contrary, the plain meaning of the statute will be given effect." Id. We found "no evidence of clear legislative intent either in the statute or legislative history to limit application of the statute to the divorce context." Id. at 79, 828 P.2d at 272. Accordingly, this court concluded that Akina's conduct fell within the plain meaning of the statute, but nevertheless held that the circuit court abused its discretion in denying Akina's motion to dismiss because Akina's conduct was "too trivial to warrant the condemnation of conviction." Id. (citing HRS § 702-236(1)(b)).

Likewise, in Ornellas, the defendant was convicted of abuse of a family and household member in violation of HRS § 709-906 (Supp. 1992), which provided, in pertinent part, that "[i]t shall be unlawful for any person . . . to physically abuse a family or household member[.]" 79 Hawaiʻi at 420 n.1, 903 P.2d at 725 n.1. The ICA determined that, "[a]s evidenced by the

language of HRS § 709-906, the purpose of the statute is to protect household members from physical abuse. In essence, HRS § 709-906 seeks to prevent violence between those persons denoted as 'household members.'" Id. at 423, 903 P.2d at 728 (emphasis added) (citations omitted).

B. The purpose of the prohibition in HRS § 134-7(b) is to reduce the risk that persons convicted of certain crimes will commit further crimes using firearms

HRS § 134-7 provides, in relevant part:

> Ownership or possession prohibited, when; penalty
> . . .
> (b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.
> . . .

The statutory language explicitly proscribes the possession of "any firearm or ammunition" by a person convicted of a felony. HRS § 134-7(b) (emphasis added). The statute reflects the determination by the legislature that the possession of firearms or ammunition by certain categories of people raises an unacceptable risk that those items will be used for unlawful purposes. As set forth below, the legislature has, over the years, expanded the scope of the statute by broadening the categories of both prohibited persons and prohibited items. Moreover, the legislative history of HRS § 134-7(b) reflects the legislature's belief that the possession of any firearm or ammunition by a felon raises an unacceptable risk that such

firearms or ammunition will be used for "criminal and violent purposes." See 1968 Haw. Sess. Laws Act 19, § 1 at 23.

The origins of HRS § 134-7 were discussed by the ICA in State v. Auwae, 89 Hawaiʻi 59, 968 P.2d 1070 (App. 1998), overruled in part on other grounds by State v. Jenkins, 93 Hawaiʻi 87, 997 P.2d 13 (2000):

> The first Hawaiʻi law prohibiting certain convicted persons from owning or possessing certain firearms was enacted in 1927 by the Territory of Hawaiʻi Legislature (the Territorial legislature) as section 4 of Act 206 of the 1927 Session Laws:
>
> > Section 4. Persons forbidden to possess small arms. No person who has been convicted in this territory or elsewhere, of having committed or attempted a crime of violence, shall own or have in his possession or under his control, a pistol or revolver.
>
> 1927 Sess. L., Act 206, § 4, at 209 (emphasis added). In 1933, the legislature amended the 1927 Sess. L., Act 206, § 4 to read, "No person who has been convicted . . . of having committed or attempted a crime of violence, shall own or have in his possession or under his control a pistol or revolver or ammunition therefor." 1933-34 Sess. L., Act 26, § 6, at 38. . . . The legislature did not specifically . . . comment on the addition of the words "or ammunition therefor."

Id. at 68, 968 P.2d at 1079 (footnotes omitted) (emphasis in original).

Act 206 was subsequently codified in Revised Laws of Hawaiʻi (RLH) 1935 § 2545. Id. The statute was subsequently amended on multiple occasions, including in 1951, when the category of persons who were prohibited from possessing firearms was expanded to include any person who had been convicted of "the illegal use, possession or sale of narcotics[.]" 1951 Haw. Sess. Laws Act 253, § 1 at 422; S. Stand. Comm. Rep. No. 490, in 1951

Senate Journal, at 1079 ("The purpose of this bill is to prohibit the ownership or possession of any firearm or ammunition by a person convicted of the illegal use, possession, or sale of narcotics. The existing statute is aimed at any person convicted of a crime of violence or any attempt thereto.").

By 1965, the statute had been renumbered as RLH § 157-7, and read, in pertinent part:

> No person who has been convicted in this State or elsewhere, of having committed or attempted a crime of violence, or of the illegal use, possession or sale of narcotics, shall own or have in his possession or under his control any firearm or ammunition therefor.

RLH 1965 § 157-7(b).

In 1968, RLH § 157-7 was recodified by Act 19 as HRS § 134-7 (1968). Act 19 made violation of the statute a felony, rather than a misdemeanor. 1968 Haw. Sess. Laws Act 19, § 2 at 24; H. Stand. Comm. Rep. No. 321, in 1968 House Journal, at 367. In the text of Act 19, the legislature provided a statement concerning the purpose of the Act, which clearly identified the legislature's concern with violent gun crimes:

> During recent years, there has been an alarming increase in the number of crimes involving the use of firearms in the State of Hawaii. Up to two years ago the number of armed robberies was few in comparison to the total number of robberies of all kinds and the use or possession of firearms by other arrestees was very few in number.
>
> Since the possession of firearms and/or ammunition by persons having a prior record of convictions for crimes of violence gives rise to a reasonable apprehension that such persons might use such firearms for criminal and violent purposes, legislation prohibiting the possession or control of firearms by such persons and making such possession a felony is urgent and necessary for protection of the general public.

1968 Haw. Sess. Laws Act 19, § 1 at 23 (emphasis added).

In 1971, the legislature expanded HRS § 134-7(b) to include all convicted felons. 1971 Haw. Sess. Laws Act 78, § 1 at 196; S. Stand. Comm. Rep. No. 524, in 1971 Sen. Journal, at 1036-37; see also State v. Samonte, 83 Hawaiʻi 507, 535, 928 P.2d 1, 29 (1996) ("The Hawaiʻi legislature has indicated that HRS § 134-7 applies to all convicted felons.") (emphasis in original). Also in 1971, the legislature added a provision to HRS § 134-7 that imposed a mandatory minimum sentence for the possession of any firearms or ammunition by a convicted felon.[8] 1971 Haw. Sess. Laws Act 78, § 1 at 196. In its report on the bill that added the provision, the Senate Committee on Judiciary noted:

> it is your committee's considered decision and opinion that in this one area of the law, namely the prevention of crimes involving illegal possession or use of firearms, the law must be strengthened immediately, and that these amendments, although drastic are justified and necessary for the protection and safety of the law-abiding citizens and residents of this State.

S. Stand. Comm. Rep. No. 524, in 1971 Sen. Journal, at 1036-37.

The House Judiciary Committee described the 1971 amendments as "amend[ing] the existing firearms laws so that they will be more effective in deterring and preventing the

[8] The provision requiring a mandatory minimum sentence was removed in 1975, and violation of HRS § 134-7 was made a class C felony. 1975 Haw. Sess. Laws Act 24, § 4 at 34. In 1981, HRS § 134-7 was amended to provide that "any felon violating subsection 134-7(b) shall be guilty of a class B felony." 1981 Haw. Sess. Laws Act 239, § 5 at 466. However, the legislative history concerning Act 239 is silent on the reason for the 1981 change. See Conf. Comm. Rep. No. 48, in 1981 House Journal, at 922; S. Stand. Comm. Rep. No. 847, in 1981 Senate Journal, at 1274-75; H. Stand. Comm. Rep. No. 727, in 1981 House Journal, at 1241-42.

proliferation of crimes involving the illegal possession and use of firearms in the State of Hawaii." H. Stand. Comm. Rep. No. 931, in 1971 House Journal, at 1102. Moreover, this court has recognized that HRS § 134-7(b) is intended to prevent gun crimes by felons by prohibiting the possession of firearms and ammunition by such persons:

> [N]oting that "[l]icensed or registered firearms owners very seldom commit crimes with their guns," the 1971 Hawaiʻi legislature targeted severe punishment such as a "mandatory sentence of not less than one year" specifically at all "persons convicted of any felony . . . possessing any firearms or ammunition[.]" Having "come to the conclusion that severe penalties and incarceration must be adopted as the only meaningful method of stopping gun crimes[,]" the Hawaiʻi legislature's purpose for HRS § 134-7(b) has clearly been to keep firearms and ammunition out of the hands of anyone who has "committed a felony[.]"

Samonte, 83 Hawaiʻi at 535, 928 P.2d at 29 (quoting S. Stand. Comm. Rep. No. 524, in 1971 Senate Journal, at 1036) (internal citations omitted) (some brackets in original and some added) (emphasis in original).

C. Rapozo's conduct threatened the harm or evil sought to be prevented by HRS § 134-7(b)

The plain language of the statute and its legislative history support the conclusion that Rapozo's status (convicted felon, including a conviction for promoting dangerous drugs) and her conduct (concealed possession of a live bullet for the asserted purpose of making it into a charm for a bracelet) "actually cause[d] or threaten[ed] the harm or evil sought to be prevented by" HRS § 134-7(b). In reaching that conclusion, it is instructive to compare the circumstances of the instant case with

those presented in Viernes.

In Viernes, we affirmed the circuit court's order granting Viernes's motion to dismiss the charge of promoting a dangerous drug in the third degree, in violation of HRS § 712-1243,[9] as de minimis, despite the statute's explicit prohibition against the possession of "any dangerous drug in any amount." 92 Hawaiʻi at 130-31, 988 P.2d at 195-96. Viernes had been placed under arrest for having threatened to harm his wife, and was found in possession of two small plastic packets, one of which contained 0.001 grams of a substance containing methamphetamine. Id. at 131, 988 P.2d at 196. Relying on State v. Vance, 61 Haw. 291, 307, 602 P.2d 933, 944 (1979),[10] this court held that:

> an offense may be de minimis where it did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense. Under certain circumstances, this may, . . . trump the "any amount" requirement of HRS § 712-1243.

Viernes, 92 Hawaiʻi at 134, 988 P.2d at 199 (quoting HRS § 702-236) (brackets and internal quotation marks omitted).

We concluded that the purpose of the prohibition against the possession of "any dangerous drug in any amount"

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[9] HRS § 712-1243 (1993 & Supp. 1998) provided in relevant 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.

[10] In Vance, this court declined to apply the de minimis provision to a prosecution for the possession of .7584 grams of a substance containing cocaine and three tablets of secobarbital. 61 Haw. at 307, 602 P.2d at 944. However, this court noted that, in the context of the possession of trace amounts of drugs, "where a literal application of HRS § 712-1243 would compel an unduly harsh conviction . . . 'De minimis infractions' may be applicable to mitigate this result." Id.

under HRS § 712-1243 was "to respond to abuse and social harm," and "to counter increased property and violent crimes." 92 Hawaiʻi at 134, 988 P.2d at 199 (quoting H. Conf. Comm. Rep. No. 1, in 1972 House Journal, at 1050 and 1996 Haw. Sess. Laws Act 308, at 970) (internal quotation marks omitted). Although Viernes's conduct fell within the explicit scope of the statute, Viernes presented expert testimony that 0.001 grams of methamphetamine was not a sufficient quantity to "be sold or used in such a way as to have any discernable effect on the human body." Id. at 134, 988 P.2d at 199. We concluded that, "if the quantity of a controlled substance is so minuscule that it cannot be sold or used . . . , it follows that the drug cannot lead to abuse, social harm, or property and violent crimes." Id. We accordingly held that the circuit court did not abuse its discretion in dismissing the charge, even though the alleged conduct violated the statute, because the minuscule quantity Viernes possessed could not "lead to abuse, social harm, or property and violent crimes." Id. at 134, 988 P.2d at 199.

Viernes is distinguishable from the instant case. Whereas Viernes involved an amount of prohibited substance too minuscule to cause or threaten the harm the statute sought to prevent, id., the instant case involves the possession of an operable bullet with the potential to kill or seriously injure a human being, to cause other physical harm, or to be used in the commission of a crime. The possession of a live bullet by a

convicted felon under the circumstances presented here directly implicates the precise harm that the legislature sought to avoid in enacting HRS § 134-7(b). It was the legislature's judgment that the possession of firearms or ammunition by such persons posed an unreasonable risk that they would be used in "gun crimes." Samonte, 83 Hawaiʻi at 535, 928 P.2d at 29 (quoting S. Stand. Comm. Rep. No. 524, in 1971 Senate Journal, at 1036).

We respectfully disagree with the dissent's assertion that Rapozo "did not actually cause or threaten [the] harm which HRS § 134-7 seeks to prevent" because (1) she lacked the means of firing the bullet, and (2) she had not been convicted of a violent crime. Dissenting opinion at 13-14, 22-23. As we acknowledge above, supra page 17, the first point was a relevant factor for the circuit court to take into consideration in determining Rapozo's culpability. However, it is not dispositive. Otherwise, only felons who possess both guns and ammunition would be of concern to the legislature, a result which is inconsistent both with the plain language and legislative history of HRS § 134-7(b).

Nor do we agree that the legislature was not "manifestly concerned" with Rapozo because she had not been convicted of a violent felony. Dissenting opinion at 22. That interpretation is inconsistent with the plain language of the statute, as it has evolved over time. As noted above, that evolution reflects a steady expansion of the scope of the

statute, culminating in the decision in 1971 to prohibit "all" felons from possessing firearms or ammunition. That history does not suggest that the legislature inadvertently cast too wide a net in 1971, but rather that it made a considered judgment, based on decades of experience under the predecessor versions of the statute, that "all" convicted felons were of concern.

The dissent arrives at its narrow interpretation of the purpose of HRS § 134-7(b) by focusing on one passage from the preamble to the 1968 Act that discussed the risk posed by felons who had been convicted of violent crimes. Dissenting opinion at 7-8, 14-15. With all due respect, this focus on a piece of the legislative history to the exclusion of the plain language of the statute is contrary to the approach taken by this court in Akina and Kupihea, and by the ICA in Ornellas, all of which emphasized the importance of the plain language of the statute.

Moreover, even if the analytical approach suggested by the dissent was valid, the result it reaches is nevertheless incorrect. The same section of the 1968 Act cited by the dissent notes that, in addition to persons convicted of violent crimes, there was another category of person that was of particular concern to the legislature:

> Further, the amendment of section [134-7] is necessary for uniformity of legislation to include those persons convicted of crimes involving the possession or sale of depressant or stimulant drugs to the class of persons prohibited from the ownership or possession of firearms as previous legislatures had done for those convicted of narcotics offenses; it is a fact that these classes of offenders are particularly dangerous when they are apprehended or when they are under the

> influence of narcotics or drugs, and must therefore be prevented from possession of firearms for the public interest.

1968 Haw. Sess. Laws Act 19, § 1 at 23.

Although the legislature subsequently amended HRS § 134-7(b) in 1980 "to remove from the scope of section 134-7 those who have been convicted of the use or possession of drugs, unless such conviction is a felony[,]" the legislature made clear its intention that the "use or possession of prohibited drugs[,]" where such use or possession results in a felony conviction, would remain within the prohibitions of HRS § 134-7(b).[11] See Conf. Comm. Rep. No. 30-80, in 1980 Senate Journal, at 955; 1980 Haw. Sess. Laws Act 233, § 1 at 411.

Rapozo, who had a prior felony conviction for third-degree promotion of dangerous drugs, fits squarely within this category of offenders that was of particular concern to the legislature. Thus, even if one accepts the dissent's view that it is appropriate to limit the purpose of the statute to those concerns that were specifically identified in the legislative history, Rapozo fits within this core purpose of HRS § 134-7(b).

[11] The dissent asserts that "[p]ersons convicted of possession or use of drugs, where such conviction is a felony, fall within the scope of HRS § 134-7 not because the legislature was specifically concerned with such persons, but because HRS § 134-7 prohibits all felons, whether or not the conviction is drug-related, from possessing ammunition or firearms." Dissenting opinion at 28. However, the dissent's assertion is inconsistent with the express statement of the legislature that "the mere use or possession of prohibited drugs, unless the amount used or possessed constitutes a felony, do not warrant prosecution." Conf. Comm. Rep. No. 30-80, in 1980 Senate Journal, at 955.

D. Rapozo failed to carry her burden of demonstrating that her possession of a bullet was too trivial to warrant the condemnation of conviction

In State v. Park, 55 Haw. 610, 616, 525 P.2d 589, 591 (1974), this court considered the applicability of the de minimis statute to charges against a number of candidates for failing to timely file campaign expense reports. We noted that:

> We think that before [HRS § 702-236] can be properly applied in a criminal case, all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense should be shown to the judge. Such a disclosure would then enable the judge to consider all of the facts on this issue, so that he can intelligently exercise a sound discretion, consistent with the public interest, whether to grant the dismissal of a criminal case[.]

Id. at 616, 525 at 591 (emphasis added).

In addition, this court outlined a number of factors for the trial court to consider in making its determination, including (1) the background, experience and character of the defendant; (2) knowledge on the part of the defendant of the consequences of the act; (3) the circumstances surrounding the offense; (4) the harm or evil caused or threatened by the offense; (5) the probable impact of the offense on the community; (6) the seriousness of the punishment; (7) the mitigating circumstances; (8) possible improper motives of the complainant or prosecutor; (9) "any other data which may reveal the nature and degree of the culpability in the offense committed by each defendant[.]" Id.; see also State v. Cabana, 716 A.2d 576, 579 (N.J. Super. Ct. Law Div. 1997) (defendant's conduct "under the

de minimis statute is not viewed in isolation, but coupled with the surrounding circumstances which play an integral part herein to explain the what, why and how of defendant's intent."). Because the district court in Park failed to take those factors into account in dismissing the charges as de minimis, we reversed its dismissal of the charges, noting:

> [T]he district court did not consider the merits of this issue on an individual basis. . . . The record in each case is utterly bare of the attendant circumstances surrounding these violations. Under the circumstances, we think it was an abuse of discretion to dismiss the charges as de minimis infractions without any indicators to show that each of these offenses was in fact an innocent, technical infraction, not actually causing or threatening any harm or evil sought to be prevented by [the statute under which the defendants were charged], or that the harm or evil caused or threatened was [too] trivial to warrant the condemnation of conviction.

Park, 55 Haw. at 617-18, 525 P.2d at 591-92.

In State v. Fukagawa, 100 Hawaiʻi 498, 506-07, 60 P.3d 899, 907-08 (2002), this court affirmed an order of the trial court denying Fukagawa's motion to dismiss as de minimis a charge of promoting a dangerous drug in the third degree. The trial court found that the amount of substance containing methamphetamine that Fukagawa possessed could have an effect on the nervous system or mind, and was therefore not de minimis. Id. at 503, 60 P.3d at 904. We noted that in making a motion to dismiss an offense as de minimis,

> [T]he defendant bears the burden of establishing that "his or her conduct neither caused nor threatened to cause the harm or evil that the statute, under which he or she is charged, seeks to prevent." In advancing a motion to dismiss a charge as a de minimis offense, the defendant must address both "the nature of the conduct alleged and the nature of the attendant

> circumstances." Further, . . . dismissal of a prosecution without any indicators from the surrounding circumstances that demonstrate a de minimis infraction would constitute an abuse of discretion.

Id. at 507, 60 P.3d at 908 (citations omitted) (emphasis in original); see State v. Oughterson, 99 Hawaiʻi at 256, 54 P.3d at 427 (noting that "insofar as the defendant advances a motion to dismiss on de minimis grounds, it is the defendant, and not the prosecution, who bears the burden of proof on the issue") (emphasis in original).

Moreover, we noted that "quantity is only one of the surrounding circumstances a court must consider." Id. at 505, 60 P.3d at 906 (citing Vance, 61 Haw. at 307, 602 P.2d at 944). We held that Fukagawa's assertion that his conduct was de minimis failed because "the defense focused solely upon the amount of methamphetamine possessed and presented neither testimony nor other evidence regarding the circumstances attendant to Fukagawa's possession of drug paraphernalia and the substance containing methamphetamine." Id. at 507, 60 P.3d at 908. Thus, "[i]n light of the defendant's burden to prove that his conduct constituted a de minimis infraction and the evidence adduced in this case," we held that the trial court did not abuse its discretion in denying the motion. Id.

In State v. Carmichael, 99 Hawaiʻi 75, 76, 53 P.3d 214, 215 (2002), the defendant was pulled over by police who observed him traveling between 84 and 86 mph in an area with a 30 mph

speed limit. He smelled of alcohol, was unsteady on his feet, slurred his words, and gave inconsistent answers regarding the amount he had been drinking. Id. He was arrested and taken to the police station, where a glass pipe containing a white crystalline substance, two metal scrapers, a small plastic straw, and "several ziplock bags containing a light rock residue visible to the naked eye" were found in his sock. Id. Carmichael was charged with, inter alia, promoting a dangerous drug in the third degree under HRS § 712-1243, and the circuit court declined to dismiss that charge as de minimis. Id. at 77, 53 P.3d at 216.

On appeal, this court affirmed. In a plurality opinion, Chief Justice Moon observed that "the defendant bears the burden of establishing that the conduct constituted a de minimis infraction[,]" and must "adduce evidence regarding both the conduct alleged and the attendant circumstances in order to support a finding that the alleged conduct was de minimis." Id. at 80, 53 P.3d at 219 (opinion of Moon, C.J., and Nakayama, J.) (citation omitted). The plurality noted that at both the hearing on his motion to dismiss and on appeal, Carmichael focused his argument exclusively on whether the amount of drugs in his possession constituted a useable amount, and "did not adduce any evidence or present any argument with respect to the attendant circumstances," namely Carmichael's possession of multiple items associated with the use and distribution of methamphetamine, his driving at excessive speed, and the arresting officer's

determination that Carmichael was impaired. Id. The plurality observed:

> By failing to address these attendant circumstances, the defense failed to meet its burden of providing evidence to support a finding that the conduct alleged "did not actually cause or threaten the harm or evil sought to be prevented by [HRS § 712-1243] or did so only to an extent too trivial to warrant the condemnation of conviction."

Id. (quoting HRS § 702-236) (brackets in original).

Here, Rapozo addressed her alleged conduct and the attendant circumstances solely through her attorney's declaration in support of her motion to dismiss. Although the declaration asserted that "Rapozo's explanation for having the bullet in her possession was that she was going to have it made into a charm for a bracelet," Rapozo offered no further evidence or testimony to corroborate that asserted explanation. She did not explain why, if her purpose in possessing the bullet was to make it into a charm for a bracelet, she was carrying it with her while driving at 1:14 a.m. in Waikiki. Nor did she explain why, if her purpose was benign, she concealed the bullet in an intimate part of her clothing. Nor did she explain where and when she obtained the bullet, and where she was traveling from and going to when she was stopped by police.[12]

[12] The dissenting opinion asserts that the circuit court "considered all of the relevant and material circumstances attendant to [Rapozo's] possession" because the court considered the facts as set forth in Rapozo's declaration of counsel. Dissenting opinion at 31 (emphasis added). With all due respect, however, the dissent's view would appear to allow a defendant to limit which circumstances are considered "material." However, as we discuss further infra, the trial court should consider "all of the relevant facts bearing on the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense" before dismissing a (continued...)

Notably, the circuit court, in its findings of fact, did not determine whether Rapozo's asserted explanation was credible. FOF 6 merely reiterates that "Ms. Rapozo's explanation for possessing the bullet was that she was going to have it made into a charm for a bracelet." In other words, although the circuit court accurately repeated the explanation as set forth in the declaration of Rapozo's counsel, it did not find that it was in fact true. We therefore respectfully disagree with the dissent's assertion that "[Rapozo's] explanation . . . is binding on this court."[13] Dissenting opinion at 12.

It is not surprising that the circuit court failed to make a finding on the credibility of the explanation, since there

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[12](...continued)
charge as de minimis, see Viernes, 92 Hawaiʻi at 133, 988 P.2d at 198 (emphasis added) (citation omitted), and we have found abuse of discretion when in our judgment the trial court failed to do so, see Park, 55 Haw. at 617-18, 525 P.2d at 591-92. We have also affirmed when the trial court denied motions to dismiss and the defendant failed to address attendant circumstances that we considered to be relevant. See Carmichael, 99 Hawaiʻi at 80, 53 P.3d at 219 (plurality opinion of Moon, C.J.; and Nakayama, J.) (affirming denial of motion to dismiss the charge of promoting a dangerous drug in the third degree as de minimis where the defendant addressed the quantity of drug possessed, but did not address his possession of drug paraphernalia, his driving at excessive speed, or the arresting officer's determination that the defendant was intoxicated); Fukagawa, 100 Hawaiʻi at 506-07, 60 P.3d at 907-08 (affirming denial of motion to dismiss the charge of promoting a dangerous drug in the third degree as de minimis because the amount possessed was sufficient to be "'used' by someone" and, alternatively, because the defendant "presented neither testimony nor other evidence regarding the circumstances attendant to [his] possession of drug paraphernalia and the substance containing methamphetamine").

[13] We further disagree with the dissent's assertion that "it can be inferred from both the inclusion of [Rapozo's] explanation in its findings and in ultimately granting [Rapozo's] de minimis motion , that the [circuit] court made an assessment as to [Rapozo's] explanation." Dissenting opinion at 38. To the contrary, the wording of FOF 6 suggests that the circuit court reserved decision on the credibility of Rapozo's proffered explanation. For the same reason, we disagree with the implication that we have second-guessed the circuit court's determination with regard to credibility. Dissenting opinion at 38-39.

was insufficient information in the record to enable it to do so. As noted above, Rapozo had the burden in the circuit court of establishing the relevant attendant circumstances, but failed to place any information in the record that would have enabled the court to determine that her explanation was credible in light of the surrounding circumstances, and that her conduct was in fact "trivial" given the purposes of the statute. She chose not to present her own testimony or that of any other "live" witness that would have allowed the explanation to be further developed, and also limited the attendant circumstances that were presented to the court to the immediate circumstances of her arrest. While we agree that the de minimis statute does not specify any particular method of proof by the defendant, dissenting opinion at 29-30, nevertheless it does require the defendant to present all of the relevant attendant circumstances to the court, and Rapozo failed to do so here. See State v. Park, 55 Haw. at 616, 525 P.2d at 591 ("We think that before [HRS § 702-236] can be properly applied in a criminal case, all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense should be shown to the judge.").

The dissent further asserts that Rapozo's explanation "cannot be viably or fairly challenged on appeal or relied on by the majority" because the State "did not challenge the credibility of [Rapozo's] explanation in its memorandum in

opposition to [Rapozo's] motion to dismiss or at the hearing on the motion." Dissenting opinion at 34. However, the State's opposition to Rapozo's motion clearly disputed Rapozo's characterization of the relevant events, by arguing that "[Rapozo's] possession of ammunition that is capable of being fired, considered with all of the other attendant circumstances, shows that [Rapozo's] conduct was causing or threatening the harm or evil sought to be prevented by the law defining the offense." (Emphasis added). Moreover, in its Opening Brief to the ICA, the State challenged the circuit court's COL 6, which concluded that Rapozo had met her burden of showing that the de minimis statute applied. In support of this point of error, the State argued, inter alia, that there was no "determination of credibility with regard to [Rapozo's] explanation[.]"[14] While the dissent cites to Wisdom v. Pflueger, 4 Haw. App. 455, 459, 667 P.2d 844, 848 (1983) for the proposition that "an argument supporting a challenge to a conclusion on appeal does not amount to a challenge to a finding," dissenting opinion at 37, the ICA in Pflueger explained that "[i]f a finding is not properly attacked, . . . any conclusion which follows from it and is a correct statement of the law is valid." 4 Haw. App. at 459, 667 P.2d at 848. Here, FOF 6 merely repeats Rapozo's explanation, and thus COL 6 does not "follow[] from" FOF 6. Accordingly, the

[14] We note that Rapozo has not, in her Answering Brief to the ICA or in her Application to this court, objected to the State's challenge to the credibility of her explanation on the ground that the argument was waived.

credibility of Rapozo's explanation and the failure of the circuit court to enter a finding on that issue are properly before this court.

In order to properly exercise its discretion under HRS § 702-236, the trial court must consider all of the relevant surrounding circumstances. See Park, 55 Haw. at 617-18, 525 P.2d at 592. Where, as here, the defendant's explanation for his or her conduct is central to that inquiry, it is not sufficient to simply repeat the defendant's explanation without making a finding as to its credibility in light of all the circumstances. See State v. Balanza, 93 Hawaiʻi 279, 283, 1 P.3d 281, 285 (2000) (noting that "[b]efore a trial court can address whether an offense constitutes a de minimis infraction, the court must make factual determinations regarding the circumstances of the offense") (citation omitted).

We respectfully disagree with the dissent's suggestion that our decision here is inconsistent with State v. Hinton, 120 Hawaiʻi 265, 273, 204 P.3d 484, 492 (2009), dissenting opinion at 44-51, where, in reviewing a trial court's decision to dismiss an indictment after defendant's first trial resulted in a mistrial, we observed that "[t]he burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it." Assuming arguendo that a "strong showing" is required in the instant context as well, this court has held that a failure by a trial court to consider all of the relevant

attendant circumstances suffices to make the necessary showing. See Park, 55 Haw. at 617-18, 525 P.2d at 591-92; cf. Fukagawa, 100 Hawaiʻi at 507, 60 P.3d at 908. The failure to consider those circumstances, the consideration of which is required by HRS § 702-236, means that the circuit court has "disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Oughterson, 99 Hawaiʻi at 253, 54 P.3d at 424 (citation omitted). Where the issue is whether a trial court applied incorrect legal principles in exercising its discretion, we freely review the court's decision to determine whether the law was correctly applied. Estate of James Campbell, 106 Hawaiʻi 453, 461, 106 P.3d 1096, 1104 (2005) ("although the trial court's discretion under Rule 24(b)(2) is very broad, we may overturn the probate court's denial of intervention under HRCP Rule 24(b)(2) if we conclude that it has disregarded legal principles to the substantial detriment of Appellants") (internal quotation marks, brackets and citations omitted); Life of the Land v. Land Use Comm'n, 63 Haw. 166, 180, 623 P.2d 431, 443 (1981) ("where the record discloses a possible misapprehension or misapplication of Rule 23's criteria, it is incumbent upon us to conduct a careful review of the rule's application to the facts involved").

Moreover, even if Rapozo's explanation is accepted at face value, it does not, on the current record, suffice to establish that her conduct was de minimis. Although the

declaration of Rapozo's counsel states that Rapozo intended to make the bullet into a charm for a bracelet, it does not state that Rapozo intended to render the bullet inoperable in doing so. Thus, under her proffered explanation, Rapozo could have carried a live bullet with her indefinitely. This contrasts sharply with a situation in which a defendant possesses a prohibited item for a short period of time and for a reason that is not inconsistent with the purpose of the statute in question. See Carmichael, 99 Hawaiʻi at 80 n.8, 53 P.3d at 219 n.8 (noting that "in a case where the evidence demonstrates that a defendant had knowingly recovered a quantity of methamphetamine with the intent to deliver it to police as evidence of a crime when he was arrested and charged for possessing 'any amount' of a dangerous drug, dismissal as a de minimis offense would clearly be warranted"); see also Park, 55 Haw. at 617-18, 515 P.2d at 592 ("we think it was an abuse of discretion to dismiss the charges as de minimis infractions, without any indicators to show that each of these offenses was in fact an innocent, technical infraction").

We cannot say that the open-ended possession by Rapozo of a live round of ammunition threatens the harm that the statute was designed to prevent only to a trivial extent. Thus, Rapozo failed to carry her burden of proof on the motion to dismiss.

It is instructive to compare the circumstances of this case to those surrounding the defendant's conduct in State v. Akina, 73 Haw. 75, 828 P.2d 269 (1992). In Akina, the defendant

was charged with custodial interference after assisting Sue, a ward of the State who had run away from her foster parents. Id. at 76, 828 P.2d at 270. Sue had approached Akina at a beach park, and told him that she was nineteen years old and pregnant. Id. Akina invited her to come to the home that he shared with his mother, and Sue stayed with them for two weeks, during which time Akina informed Sue's foster parents of her whereabouts and requested that Sue return to them. Id. Sue eventually did return home but ran away again to Akina. Id. at 76-77, 828 P.2d at 270-71. When Akina again attempted to return her to her foster parents, the foster parents told him that it was a criminal offense to help runaways. Id. at 77, 828 P.2d at 271. When Sue refused to return, he agreed to let her stay at his home until the following week. Id. Sue's foster parents then called the police, and Akina was charged with custodial interference in violation of HRS § 707-727(1)(a) (1985).[15] Id.

The case went to trial, where

> [D]efendant testified that he was just trying to help Sue. [Sue's foster father] agreed, testifying that he felt defendant was a nice person who was sincerely trying to help. Even the prosecuting attorney conceded that defendant's pattern of behavior showed that he wanted to help Sue. The court concluded that "[d]efendant's main sin was being–or allowing himself to be taken advantage of."

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[15] HRS § 707-727 (1985) provided in relevant part:

> (1) A person commits the offense of custodial interference in the second degree if:
>
> (a) He knowingly takes or entices a person less than eighteen years old from his lawful custodian, knowing that he has no right to do so.

Id. (some brackets in the original and some added).

However, the circuit court denied Akina's motion to dismiss the charge as de minimis, reasoning that Akina's actions fell within the plain meaning of the statute and that convicting Akina would comply with legislative intent. Id. This court agreed that Akina's conduct fell within the plain meaning of the statute, but nevertheless held that the circuit court abused its discretion in denying Akina's motion to dismiss because Akina's conduct was "too trivial to warrant the condemnation of conviction." Id. at 79, 828 P.2d at 272 (citing HRS § 702-236(1)(b)). We noted that under the circumstances, "there was little [Akina] could do to worsen Sue's relationship with her custodial parents." Id. Moreover, "[Akina's] actions did not cause the rift between Sue and her parents, and it is unlikely that his actions altered the existing custodial relationship at all." Id.

In sum, the record in Akina amply established that the defendant's interference did not "warrant the condemnation of conviction" when his conduct and the attendant circumstances were examined in light of the purposes of the statute. In contrast, the explanation proffered in the declaration of Rapozo's attorney did not adequately address the nature of her conduct and the circumstances attendant to the offense, and thus did not

establish that Rapozo's conduct was trivial.[16] See Park, 55 Haw. at 617-18, 525 P.2d at 592; Fukagawa, 100 Hawaiʻi at 504, 60 P.3d at 905. Therefore, Rapozo did not carry her burden of establishing that the de minimis provision applies. See id.

Finally, we note that both this court and the ICA have considered the seriousness of the alleged conduct in determining whether a trial court abused its discretion in ruling on a motion to dismiss a charge as de minimis. See, e.g., Park, 55 Haw. at 617, 525 P.2d at 592 (noting that the court should consider "the resulting harm or evil, if any, caused or threatened by these infractions; the probable impact of these violations upon the community; the seriousness of the infractions in terms of the punishment . . ."). For example, in State v. Schofill, 63 Haw. 77, 621 P.2d 364 (1980), the trial court dismissed a charge of promoting a dangerous drug in the first degree, where the defendant allegedly agreed to sell an undercover police officer a quarter ounce of cocaine for $550. Id. at 79, 83, 621 P.2d at 376, 370. This court reversed, noting that the charge of "[p]romoting a dangerous drug in the first degree . . . is a Class A felony, punishable by imprisonment for a period of 20 years" and observing that "[t]raffic in narcotics can hardly be said to be a de minimis offense." Id. at 83, 621 P.2d at 370.

[16] We note that Akina was decided with the benefit of a full trial record. 73 Haw. at 77, 828 P.2d at 271. Nothing in this opinion should be construed to prevent Rapozo from pursuing a motion to dismiss pursuant to HRS § 702-236 at a later time in the event a more fully developed record supports dismissal.

Similarly, in State v. Johnson, 3 Haw. App. 472, 475, 653 P.2d 428, 431 (1982), the ICA considered whether a prosecution for negligent homicide, where the defendant's car crossed over the centerline of Hana Highway and struck an oncoming car, killing a passenger therein, was de minimis. The ICA affirmed the order of the circuit court denying Johnson's motion to dismiss, concluding that, "[u]nder the circumstances of a case where a death results from one's negligence, we deem it an assault on good sense to argue that the violator's actions were de minimis." Id. at 484, 653 P.2d at 436-37.

In the instant case, the possession of ammunition in violation of HRS § 134-7(b) is a class B felony, involving conduct that has the potential for serious public safety consequences. While not dispositive, these factors weigh against granting the motion.

IV. Conclusion

The June 5, 2009 judgment of the Intermediate Court of Appeals is affirmed, and this matter is remanded to the Circuit Court of the First Circuit for proceedings consistent with this opinion.

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