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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

PULUMATA'ALA ELI, Petitioner/Defendant-Appellant.

NO. SCAP-30420

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(ICA NO. 30420; FC-CR NO. 07-1-0066)

APRIL 13, 2012

DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH RECKTENWALD, C.J., JOINS

Because I disagree with the majority's conclusion that the Honolulu Police Department ("HPD") detective's initial question to petitioner/defendant-appellant Pulumata'ala Eli on October 27, 2007 constituted custodial interrogation for which Miranda warnings were required, and because I therefore also disagree that the asking of the initial question was an illegality that rendered Eli's statement inadmissible at trial under the fruit of the poisonous tree doctrine, I respectfully dissent.

On October 31, 2007, Eli was indicted by a grand jury for Attempted Murder in the Second Degree. This charge was based on an incident that took place on October 24, 2007, wherein Eli "assaulted and seriously injured his seven-month-old [baby] daughter . . . at Ala Moana Beach Park." Specifically, "[Eli] allegedly slapped [the] infant's head four times and threw her against the car passenger seat several times." On October 27, 2007, Eli turned himself in at Kapi'olani Hospital and was arrested there and transported to the main police station by HPD.

At the police station, the detective identified himself to Eli, told Eli "that he [had been] arrested for the assault on his seven-month-old daughter," and "may have asked [Eli] whether he would like to speak to [the detective] and tell his side of [the] story." At that point, the detective had not given Eli any Miranda warnings, but also had not asked Eli any questions about the case. Eli indicated that he was willing to make a statement, at which time the detective began audio recording the interview. The detective first asked Eli background questions, including Eli's level of education and ability to understand English, as well as whether Eli was rested, feeling well, and had a clear mind. The detective determined that Eli was competent to make a statement and then warned Eli of his Miranda rights using a standard HPD Form 81, entitled "Warning Persons Being Interrogated Of Their Constitutional Rights." The detective had

one copy of Form 81 and read it aloud while Eli had another copy of the form and read along. Eli then initialed the form, indicating that he understood his rights as told to him, he did not want an attorney, and he was willing to make a statement. As Eli related in his statement, after parking his van at Ala Moana Beach Park, he and his girlfriend got into an argument about their relationship. During this argument, Eli's daughter was crying and would not stop; in an attempt to quiet his daughter, Eli hit her feet and the back of her head four times. Eli also stated that he removed her from her car seat and then dropped her back on the car seat by accident. At some point after that, Eli "threw her on her [car] seat" two times and she "stopped crying [and] stopped breathing[.]" After this happened, Eli drove his daughter to Kapi'olani Hospital. At the end of the interview, Eli confirmed to the detective that he had made his statement voluntarily and that no one had either promised Eli anything or coerced, threatened, or forced him to make his statement.

On June 9, 2009, the State filed a motion to determine the voluntariness of Eli's statement, and the circuit court held a hearing on the motion on June 12, 2009. Based on the detective's testimony during direct and cross-examination and receipt of Eli's HPD Form 81 into evidence, the court concluded:

Based on the evidence that's presented to the [c]ourt, the [c]ourt finds that the statement made by defendant Eli was done voluntarily, knowingly, and intelligently. Now, the

[c]ourt notes that although he admitted that his primary language is Samoan, it's pretty clear that the defendant understood what he was told. The initial -- the respective boxes -- he signed the bottom of the form and his answers were -- his answers related to the subject matter of the questions being asked.

So therefore, the [c]ourt finds that the statement was voluntarily, intelligently, and knowingly made and, therefore, the [c]ourt does find that the State can admit that evidence or use the statement at trial.

A jury trial was held thereafter, and the jury found Eli guilty of attempted manslaughter. The jury also found that Eli "inflicted serious bodily injury upon a person who was eight years or younger" and "knew or reasonably should have known that said person was eight years or younger[.]"

On appeal to this court pursuant to our acceptance of Eli's application for transfer, Eli argued in pertinent part that "he was subjected to interrogation during a 'pre-interview' without being advised of his Miranda rights." Majority Opinion at 13. The majority concludes that because Eli

was advised he was under arrest for assault, and his child was in the hospital allegedly due to his acts, [the detective] should have known that asking [Eli] for his side of the story and indicating that it was his chance to give that story was 'reasonably likely' to elicit an incriminating response; in other words, it was reasonably likely that the detective's question and statement solicited [Eli] to speak about the circumstances of the case that had resulted in his arrest.

Majority Opinion at 23-24. The majority thus holds that "[i]n inviting [Eli] to speak and in obtaining his commitment to do so before Miranda warnings were given, the police elicited statements without informing [Eli] of the consequences of his waiving his right to remain silent and the entire panoply of

rights such a commitment involved.” Majority Opinion at 25. The majority also holds that the circuit court “erred in determining that the question and statement by the detective were merely ‘preliminary.’” Majority Opinion at 26.

As an initial but critical matter, I believe the majority errs in failing to regard the detective’s initial question to Eli as strictly a preliminary one. Instead, the majority characterizes the detective’s initial question as a “pre-interview” for which, according to the holding of this court in State v. Joseph, 109 Hawai‘i 482, 128 P.3d 795 (2006), Eli’s Miranda rights attach and require that the requisite warnings be given. Majority Opinion at 1. Under Joseph, it is true that the police cannot engage in a “pre-interview” in which a defendant is allowed to make incriminating statements without having been given Miranda warnings, only to then be given warnings and encouraged to repeat the same incriminating information during a “formal” or post-Miranda interview, see Joseph, 109 Hawai‘i at 499, 128 P.3d at 812; the present case, however, is clearly distinguishable from Joseph.

In Joseph, this court affirmed the order of the circuit court suppressing Joseph’s statements made to HPD during a “pre-interview.” 109 Hawai‘i at 483-84, 128 P.3d at 796-97. In that case, Joseph had voluntarily surrendered to police in connection with a shooting that had happened earlier on the same day. Id.

at 484, 128 P.3d at 797. Joseph was arrested and detained by HPD at the main police station; the next day, Joseph's attorney informed HPD Detective Osmond that Joseph wanted to make a statement. Id. After Joseph's attorney arrived at the police station, he and Joseph first had a private meeting; when the attorney informed Osmond and HPD Detective Tamashiro that Joseph was ready to give a statement, the two detectives entered the room, turned on video recording equipment, and began to engage in a "pre-interview discussion" with Joseph. Id. This pre-interview lasted approximately twenty-two minutes, went into considerable depth regarding the events at issue in the case, and included certain incriminating statements that Joseph later moved to have suppressed. See id. at 484-487, 128 P.3d at 797-800. Between the pre-interview and a "formal interview" that was conducted immediately thereafter, the detectives then asked Joseph some background questions, gave him HPD Form 81, and advised him of his Miranda rights. Id. at 487, 128 P.3d at 800. The post-Miranda formal interview lasted one hour and twenty minutes, and as the circuit court noted in its findings of fact filed in connection with Joseph's motion to suppress, "[t]he detectives' post-Miranda questioning sought a repetition and expansion of information provided during the pre-Miranda session." Id. at 490, 128 P.3d at 803. Accordingly, this court held on appeal that "Joseph should have been warned of his right

to remain silent prior to the pre-interview." Id. at 493, 128 P.3d at 806. We further held that "[b]ecause he was not provided such warnings, all statements obtained from him must be suppressed, along with the fruits of the pre-interview statements." Id. (citing State v. Pebria, 85 Hawai'i 171, 174-75, 938 P.2d 1190, 1193-94 (App. 1997)). This case is clearly distinguishable from Joseph. In Joseph, suppression was affirmed because "the statement obtained from Joseph in the pre-interview was obtained in violation of his right to remain silent. The pre-interview statements were exploited in that Joseph was subsequently questioned on the same matter in order that he would repeat his earlier statement." Id. at 499, 128 P.3d at 812. In this case, what this court has referred to as a "pre-interview" never took place. In Joseph, which the majority relies on in support of its position, Joseph made incriminating statements without having been informed of his Miranda rights and without having validly waived his right to remain silent. Once the police detectives were aware of the incriminating statement, they then finally Mirandized Joseph¹ and conducted the "formal"

¹ In fact, the detectives acknowledged this to be their procedure, insofar as Detective Tamashiro admitted on cross-examination during the trial:

Q. You didn't Mirandize him in that first meeting?
A. No, we didn't until we obtained the statement.

Joseph, 109 Hawai'i at 496, 128 P.3d at 809 (emphases in original).

interview so as to ensure that the incriminating statements made by Joseph in the pre-Miranda "pre-interview" would be repeated. Here, when the detective began talking with Eli, the only question asked was whether Eli was willing to make a statement. When Eli answered that he was, the detective did not ask Eli anything other than straightforward background questions until informing Eli of his Miranda rights using HPD Form 81, which Eli understood, acknowledged, and waived. Only then did the detective ask Eli questions likely to produce an incriminating response, i.e., questions related to Eli's involvement in the alleged criminal assault of his daughter.

Because, as this court held in State v. Naititi, 104 Hawai'i 224, 227, 87 P.3d 893, 896 (2004), preliminary questions to a defendant do not constitute custodial interrogation, I would hold that the circuit court did not err in determining that the detective properly conducted the interview by informing Eli of his constitutional rights before Eli made any statements, that Eli understood and validly waived his rights, and that Eli intelligently, knowingly, and voluntarily made his statement concerning his commission of the assault on his seven-month-old daughter.

In Naititi, the circuit court had determined Naititi's statements to be involuntary and therefore inadmissible at trial.

104 Hawai'i at 227, 87 P.3d at 896. On appeal, this court vacated the circuit court's order and remanded for further proceedings on the grounds that Naititi's statements were voluntary and, because Naititi was in custody but not yet subject to interrogation, Miranda warnings were not required before the statements were made. Id. at 227-28, 87 P.3d at 896-97. In that case, HPD Detective Lavarias, through an American Sign Language interpreter, asked Naititi, who was deaf and mute, "whether he wished to make a statement and be afforded the assistance of an attorney." Id. at 237, 87 P.3d at 906. Significantly, we stated that "[b]y no stretch of the imagination could these preliminary 'yes-or-no' questions be construed as the type that Detective Lavarias 'should have known . . . were reasonably likely to elicit an incriminating response' from Naititi." Id. (quoting State v. Ketchum, 97 Hawai'i 107, 121, 34 P.3d 1006, 1020 (2001); State v. Ikaika, 67 Haw. 563, 567, 698 P.2d 281, 284 (1985)) (emphasis added). Thus, when Naititi signed answers that were non-responsive to Lavarias's questions, signed to Naititi through the interpreter, we noted that "Lavarias immediately ceased further questioning and terminated the interview, thereby never reaching the point at which custodial interrogation, necessitating Miranda warnings, commenced." Id. at 237-38, 87 P.3d at 906-07. Although the interview in Naititi was terminated

while the interview here was conducted in full, the logic of Naititi still applies; that case is not "inapplicable" as the majority suggests. Majority Opinion at 20 n.19. Here, the detective began by introducing himself, explaining to Eli why he was under arrest, and asking whether Eli wanted to make a statement; at that point, Eli voluntarily agreed to make a statement. The detective then properly reviewed HPD Form 81 with Eli and informed him of his constitutional rights, including the right to remain silent, the right to have an attorney present, and the right to terminate the interview at any time. The detective also confirmed that Eli was competent to make a statement. Eli, having understood his rights as read to him, again confirmed that he wanted to make a statement and that he was not requesting an attorney. Only after Eli had been informed of and waived his Miranda rights did the detective begin to ask Eli about the alleged assault of his daughter, i.e., ask questions "likely to elicit an incriminating response" from Eli. This court has held that interrogation "involves any practice reasonably likely to invoke an incriminating response without regard to objective evidence of the intent of the police[.]" Majority Opinion at 21 (quoting Joseph, 109 Hawai'i at 495, 128 P.3d at 808). Under Naititi, as discussed, Eli's decision to make a statement made in response to the detective's preliminary

question is not the same thing as an actual statement (for which Miranda warnings must be given, as they were here); thus, a defendant's statement that he or she will make a statement is not in and of itself an incriminating response.

The majority attempts to distinguish Naititi, and to underline its decision in the present case, by pointing to the detective's additional statement that the interview was a chance for Eli to give "his side of the story." Majority Opinion at 5, 8. The majority concludes that "[b]y asking [Eli] if he wanted to give his side of the story without first stating the Miranda warnings, [the detective] violated [Eli]'s right to be informed of his right to remain silent before making the decision and commitment to give a statement." Majority Opinion at 25. In my view, this disregards the long-standing requirement that we must examine the totality of the circumstances surrounding the interview in determining the voluntariness of a defendant's statement. As we have stated, when reviewing a trial court's decision to admit a defendant's statement as voluntary, we are "required to examine the entire record and make an independent determination of the ultimate issue of voluntariness based on the totality of [the] circumstances." State v. Kekona, 77 Hawai'i 403, 406, 886 P.2d 740 (1994) (citing State v. Kelekolio, 74 Haw. 479, 502, 849 P.2d 58, 69 (1993)). In Kekona, we affirmed the

circuit court's rulings that Kekona's statement was made voluntarily and that he did not invoke his right to remain silent. Id. at 404, 886 P.2d at 741. There, we noted that the circuit court determined during a suppression hearing that Kekona had understood and validly waived his Miranda rights. Id. at 406, 886 P.2d at 743. In Kekona's case, the Maui Police Department detectives had produced a form similar to HPD Form 81 and read the entire form aloud while Kekona read along; the detectives also explained to Kekona his constitutional rights and the waiver provisions "prior to Kekona signing the form." Id. We also concluded that Kekona's statement was voluntarily made because "[t]he conditions surrounding Kekona's interrogation do not suggest that any impermissible tactics were employed by the detectives to coerce Kekona into making a statement." Id. Here, a review of the record and the totality of the circumstances of the interview do not suggest that the detective's comment about the interview being a chance for Eli to "tell his side of the story" impermissibly coerced Eli into making a statement or waiving Miranda warnings that at that preliminary point were not required to be given. After Eli initially indicated that he was willing to make a statement and before the detective asked any questions about the case, the detective properly informed Eli of his Miranda rights, read all of HPD Form 81 aloud while Eli read

along, and specifically confirmed that Eli agreed to make a statement voluntarily and of his own free will and that Eli did not request the presence of an attorney. At any point prior to his actual statement, Eli could have invoked his right to remain silent and not speak about the case; the record reveals that Eli understood his rights and validly waived them in deciding to tell the detective about the events of the case. In fact, at the end of the interview, Eli again confirmed that he had made his statement voluntarily and even told the detective, "I doing this for my daughter." Furthermore, as the record shows, at no point did Eli exercise his right to terminate the interview. Consequently, I would not hold that the circuit court clearly erred in its determination that Eli validly waived his rights and voluntarily made his statement to the detective.

Because I do not conclude that Eli's statement was obtained in violation of Miranda, I would therefore also hold that the statement was not rendered inadmissible at trial pursuant to the fruit of the poisonous tree doctrine. As the statement was made pursuant to a valid waiver of Eli's Miranda rights after he had properly been informed of them by the detective, no pre-Miranda illegality occurred to taint Eli's statement and preclude its admission and use at trial.

Accordingly, for the foregoing reasons, I would affirm
the judgment of the circuit court.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

