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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellant,

vs.

RAYMOND L. FOSTER, also known as "RAY,"
Petitioner/Defendant-Appellee.

NO. SCWC-29799

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29799; CR. NO. 06-1-0449)

CONCURRING OPINION BY ACOBA, J.

I agree that the circuit court of the second circuit (the court) correctly granted the renewed motion for judgment of acquittal filed by Petitioner/Defendant-Appellee Raymond L. Foster (Petitioner).¹ However, I disagree with the majority's conclusion that under the Hawai'i Penal Code (HPC) Petitioner

¹ When reviewing a post-verdict motion for judgment of acquittal, the standard is whether, viewing the evidence in the light most favorable to the prosecution, the evidence is "sufficient to support a prima facie case so that a reasonable mind might fairly conclude guilt beyond a reasonable doubt." State v. Timoteo, 87 Hawai'i 108, 112-13, 952 P.2d 865, 869-70 (1997) (citation omitted).

"had the power to exercise dominion and control over [the firearm and ammunition.]" Majority opinion at 25.

Petitioner was indicted and convicted of Ownership or Possession Prohibited of Any Firearm, Hawai'i Revised Statutes (HRS) § 134-7(b) and/or (h), and of Ownership or Possession of Prohibited Firearm Ammunition, HRS § 134-7(b) and/or (h). HRS § 134-7(b) and (h) (Supp. 2005) provide in relevant part as follows:

(b) No person who . . . 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 therefor². . . .

(h) Any person violating subsection . . . (b) shall be guilty of a class C felony; provided that any felon violating subsection (b) shall be guilty of a class B felony. . . .

(Emphasis added.)

As with any offense, a voluntary act is required under the HPC. HRS § 702-201 (1993). A "'[v]oluntary act' means a bodily movement performed consciously or habitually as the result of the effort or determination of the defendant." Id. But, as the HPC explains, "possession per se is not a bodily movement or an omission[.]" Commentary to HRS § 702-202. Nevertheless, the HPC makes "explicit that possession is a [voluntary act.]" Id. HRS § 702-202 (1993) defines possession as "a voluntary act if

² In HRS § 134-7(b), "possess" seems to encompass "actual" possession, while "control" would appear to encompass constructive possession. See n.3, infra.

the defendant knowingly procured or received the thing possessed or if the defendant was aware of the defendant's control of it for a sufficient period to have been able to terminate the defendant's possession." HRS § 702-202.

Consequently, the relevant and precise definition of possession that should be applied in these circumstances is that which is set forth in the HPC. State v. Moniz, 92 Hawai'i 472, 480, 992 P.2d 741, 749 (App. 1999) (Acoba, J., concurring). Logically, inasmuch as a defendant's possession must be a voluntary act, an analysis as to whether a defendant was in "possession" of "any firearm or ammunition therefor[,]" HRS § 134-7(b), should proceed from the definition of possession under HRS § 702-202.³ See State v. Auwae, 89 Hawai'i 59, 62, 968 P.2d 1070, 1073 (App. 1998), overruled on other grounds by State v. Jenkins, 93 Hawai'i 87, 997 P.2d 13 (2002) (holding that possession is a prosecutable act under HRS § 702-202).

In this case, the evidence indicates that Petitioner drove his vehicle to pick up Malano, who was carrying a black ukulele case. There was no evidence that Petitioner knew what was in the ukulele case when Malano entered the vehicle.

³ Under case law, actual possession occurs when "[a] person who knowingly has direct physical control over a thing at a given time is then in actual possession of it[;]" while "[a] person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion over a thing, either directly or through another person or persons, is then in constructive possession of it." State v. Jenkins, 93 Hawai'i 87, 110, 997 P.2d 13, 36 (2002) (citation omitted).

Subsequently, Petitioner picked up Malia Saunders and Wendy Gonsalves, and drove toward Kaupo, Maui. On the way, Petitioner stopped the vehicle. Malano then exited the car, removed a rifle from the ukulele case, and shot several rounds at an abandoned boat. Malano reentered the vehicle and Petitioner drove toward "town" in the Ulupalakua direction. At some point, Gonsalves was loading the gun while Malano was loading its clip. There was no evidence that Petitioner touched the rifle or the ammunition or that he encouraged its use. There was also no evidence that the rifle or ammunition were freely accessible to Petitioner, since it appears the rifle and ammunition were either in the ukulele case or in the hands of Malano and Gonsalves until Petitioner's vehicle was stopped and he and the others were arrested by officers from the Department of Land and Natural Resources.

From the foregoing, it cannot be inferred that Petitioner "knowingly procured or received[,]" HRS § 702-202, the firearm and ammunition. Consequently, Petitioner would be liable for the voluntary act of possession only if he was in "control of [the gun and ammunition] for a sufficient period to have been able to terminate [his] possession." Id. "Control" is defined as "[t]o exercise restraining or directing influence over[,]" or, similarly, as "to exercise restraining or directing influence over something." Moniz, 92 Hawai'i at 481, 992 P.2d at 550 (Acoba, J., concurring) (quoting Black's Law Dictionary 329 (6th

ed. 1990); Webster's Third New International Dictionary 496 (1981)).

The majority and the ICA assume that a reasonable jury could conclude that Petitioner had the power or authority to exercise dominion and control over the rifle and ammunition based on Petitioner's knowledge of and proximity to the items in the vehicle, and on his control over the vehicle. Majority opinion at 25; State v. Foster, No. 29799, 2011 WL 4953400, at *2 (App. Oct. 18, 2011) (SDO). However, the facts establish that only Malano and Gonsalves had dominion and control of the rifle and ammunition, and that Petitioner was aware of their possession of the items. There is no indication in the evidence that Petitioner "exercise[d] restraining or directing influence" over the rifle and ammunition themselves. Moniz, 92 Hawai'i at 481, 992 P.2d at 550 (Acoba, J., concurring).

It was Malano who apparently brought the rifle and ammunition into Petitioner's vehicle contained in the ukulele case. It was Malano and Gonsalves who loaded the rifle, and Malano who took several shots. The rifle and ammunition thus remained within Malano's, and possibly Gonsalves's, dominion and control, not Petitioner's, up to the stop by the officers. In fact, there was no evidence whatsoever that Petitioner ever touched, handled, or interacted with the rifle or ammunition.

In this jurisdiction, it is well-established that mere presence or mere association with a person in control of prohibited items is insufficient to establish "possession." See State v. Hironaka, 99 Hawai'i 198, 206, 53 P.3d 806, 814 (2002) (concluding that "mere proximity to the [item], mere presence, or mere association with the person who does control the [item] is insufficient to support a finding of possession.") (citation omitted) (emphasis added); State v. Yabusaki, 58 Haw. 404, 408, 570 P.2d 844, 846 (1977) (holding that mere presence is insufficient to establish criminal intent). The evidence in this case established only that Petitioner was associated with a person who was in control of prohibited items, but fails to substantiate that Petitioner himself exercised dominion and control over the contraband. Under the circumstances, a reasonable mind could not fairly conclude beyond a reasonable doubt that Petitioner possessed the rifle and ammunition. See Timoteo, 87 Hawai'i at 112-13, 952 P.2d at 869-70.

Respectfully, the ICA's position exceeded the scope of HRS § 702-202. It maintained that "[a]s the driver and owner of the [vehicle], [Petitioner] had ultimate control over who and what was allowed inside the vehicle as well as the activities occurring inside the [vehicle,]" and Petitioner could have "refused to let Malano back into [his vehicle] with the rifle and ammunition." Foster, 2011 WL 4953400, at *2. But Petitioner's

control over the vehicle and his purported ability to exclude Malano from the vehicle do not constitute possession of the prohibited items.

To decide that Petitioner could end possession by excluding Malano from the vehicle assumes what is at issue. Preventing Malano from reentering the car would only terminate possession if Petitioner in fact "exercise[d] restraining or directing influence," Moniz, 92 Hawai'i at 481, 992 P.2d at 550 (Acoba, J., concurring), over the rifle and ammunition in the first place. In other words, one would have to assume that Petitioner had possession to begin with in order to conclude that Petitioner could end his possession of the items by excluding Malano from the vehicle.

Possession stems from dominion and control over the contraband. Dominion and control over the vehicle was irrelevant because control of the vehicle did not rationally mean that Petitioner would rid himself of the rifle and ammunition unless his control of those items was first established. Absent evidence of such control, the question of whether Petitioner would "have been able to terminate [his] possession," HRS § 702-202, was simply not pertinent. Holding that Petitioner possessed the rifle and ammunition because he allowed Malano into his vehicle would expand the scope of what constitutes possession beyond the definition inhering in HRS § 702-202. Cf. Moniz, 92

Hawai'i at 481, 992 P.2d at 750 (Acoba, J., concurring) (to infer from marriage status that wife had control over drugs procured by husband lacks a rational basis and is akin to guilt by association).

Thus, in United States v. Wright, 24 F.3d 732, 735 (5th Cir. 1994), the Fifth Circuit Court of Appeals considered whether a defendant who was driving with a passenger had constructive possession, defined as ownership, dominion, or control over contraband, over a gun discovered by the police locked in the glove box of the weapon. That court concluded that there was not enough evidence of control and dominion over the gun where the evidence established that the passenger exercised complete dominion over the gun. Id. In particular, that court stated, "dominion over the vehicle . . . alone cannot establish constructive possession of a weapon found in the vehicle, particularly in the face of evidence that strongly suggests that somebody else exercised dominion and control over the weapon." Id. (emphasis added). In this case, the evidence establishes that only Malano and Gonsalves had control and dominion over the rifle and ammunition.

The only way Petitioner could be presumed to have had possession is if Petitioner had been involved in a conspiracy with Malano regarding the contraband or if Petitioner and Malano

were found to have had joint possession of the contraband. Cf. State v. Brown, 97 Hawai'i 323, 337, 37 P.3d 572, 586 (App. 2001) ("Hawai'i recognizes that two or more persons can be in joint possession of an item. Where two co-conspirators are engaged in a joint criminal activity, possession by one of the tools to further the criminal activity will be imputed to the other.") (internal citation omitted). However, Petitioner was not charged with a conspiracy. Nor was there any evidence that Petitioner acted in concert with Malano in the joint possession or use of the firearm and ammunition. Here, the evidence only establishes that Petitioner was associated with Malano and Gonsalves, and mere association with these persons did not establish that Petitioner exercised dominion and control over the items. See Parker v. Renico, 450 F. Supp. 2d 727, 733 (E.D. Mich. 2006) ("Although a defendant can jointly possess a firearm with another, more than mere association must be established to show joint possession of contraband. . . .") (citing United States v. Newsom, 452 F.3d 593, 609 (6th Cir. 2006) ("[T]he defendant's mere presence in a car where a gun is found and proximity to a gun are insufficient proof of constructive possession.")).

This case is similar to Moniz, 92 Hawai'i at 472, 992 P.2d at 741. In that case, marijuana was found in a drawer of a bedroom dresser shared by the defendant and her husband, and the

defendant was convicted of possessing the marijuana. Id. at 474-75, 992 P.2d at 743-44. Although there was evidence that the defendant saw the marijuana in the drawer, there was no evidence that she procured, received, or otherwise interacted with the marijuana. Id. There was also no evidence that the defendant exercised control over the marijuana. Id. at 481, 992 P.2d at 750 (Acoba, J., concurring). The evidence only established the defendant's awareness of the prohibited substance in the shared drawer, and thus, under those circumstances, concluding that the defendant was in control of the marijuana was improper. Id. As explained above, awareness of contraband is not enough to establish possession. Likewise, under the facts of this case, a person exercising his or her reason could not fairly conclude beyond a reasonable doubt that Petitioner was in possession of the rifle and ammunition.

Since the evidence in this case does not establish that Petitioner exercised restraining or directing influence over the rifle and ammunition, it cannot be established that Petitioner had control over those items, and hence possessed them pursuant to HRS § 702-202. Accordingly, I disagree that a reasonable mind could infer from Petitioner's knowledge of and proximity to the rifle and ammunition that Petitioner had the power to exercise dominion and control over the items. I would affirm the judgment of acquittal on the ground that there was

insufficient evidence of the "act" of possession under HRS
§ 702-202.

/s/ Simeon R. Acoba, Jr.

