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SCWC-11-0000392

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Respondent/Plaintiff-Appellee,

vs.

ALLEN TAVARES, Petitioner/Defendant-Appellant and
FRANK HAMPP, Respondent/Defendant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000392; CR. NO. 09-1-1864)

DISSENT TO REJECTION OF CERTIORARI BY ACOBA, J.

Respectfully, I would accept the Application for Writ of Certiorari (Application) because this case presents serious questions of law justifying further review. The first is whether the police had reasonable suspicion to stop the car of Petitioner/Defendant-Appellant Allen Tavares (Tavares). The second is whether there was substantial evidence that would lead a reasonable and cautious person to conclude that Tavares had constructive possession of the gun recovered from beneath his driver's seat.

I.

It is axiomatic that “[i]n regard to highway stops

. . . 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" State v. Heapy, 113 Hawai'i 283, 291, 151 P.3d 764, 772 (2007) (quoting State v. Eleneki, 106 Hawai'i 177, 180, 102 P.3d 1075, 1078 (2004)). A vehicular seizure or stop based on reasonable suspicion must be tied to "'some objective manifestation that the person stopped is, or about to be, engaged in criminal activity.'" Id. at 286, 151 P.3d at 767 (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). In order for a stop to be permissible, "reasonable suspicion must be present before [the] stop." Id. (internal quotation marks omitted). "The mere possibility of criminal activity does not satisfy the constitutional requirement . . . that 'legal wrongdoing' was taking place or was about to take place." Id. at 293, 151 P.3d 774 (internal citations and emphasis omitted) (quoting State v. Prendergast, 103 Hawai'i 451, 454, 83 P.3d 714, 717 (2004)).

Officer Michael Lucas-Medeiros (Officer Lucas-Medeiros) acknowledged that Tavares was not speeding, driving erratically, or swerving prior to the stop. The only offered basis for stopping the car was Officer Medeiros's observation of a "flash of light", which the officer "thought was a crack in the front windshield" and a decal on the passenger's side of the Acura's windshield. However, as Petitioner contends, the photographs of

the front windshield indicate that the "FOX" decal was on the passenger's side, and there was open space above, below, and to the sides of the sticker.¹ Tavares himself testified that it did not block his view.² As Tavares contends, there were no specific facts to suggest that Tavares' driving was impaired by the decal, such as hesitant or erratic driving.

In the instant case, the ordinance³ purportedly involved may not apply, since there were no facts indicating that the decal obstructed Tavares' view. See People v. Johnson, 893 N.E. 2d. 275, 280 (Ill. App. 2008) (holding that an officer's belief, after "a fleeting view in the dark" that a pair of plastic cherries hanging from the rear view mirror were a

¹ In his Application, Tavares also argues that the objective evidence shows that neither of the police officers could have observed the Acura's alleged equipment violations based on the circumstances. It was late at night, 3:00 a.m., the officers' headlights were off, and the officers were parked in the driveway, facing the road at an upward angle. According to Tavares, based on their vehicle's awkward vantage point and the time of night, the Officers could not have actually seen all that they claimed to see.

² "[W]hen the defendant's pretrial motion to suppress is denied and the evidence is subsequently introduced at trial, the defendant's appeal of the denial of the motion to suppress is actually an appeal of the introduction of the evidence at trial. Consequently, when deciding an appeal of the pretrial denial of the defendant's motion to suppress, the appellate court considers both the record of the hearing on the motion to suppress and the record of the trial." State v. Vinuya, 96 Hawai'i 472, 481, 32 P.3d 116, 125 (App. 2001) (quoting State v. Kong, 77 Hawai'i 264, 266, 883 P.2d 686, 688 (App. 1994)).

³ The Revised Ordinances of Honolulu, Section 15-19.30, provides that "No person shall drive any motor vehicle with any sign, poster, or other nontransparent material upon the front windshield, side wings, or side or rear windows of such vehicle which obstructs the driver's clear view of the highway or any intersecting highway." (Emphasis added.) Neither the State nor the ICA cited any ordinance applicable to the crack in the windshield.

material obstruction was not justifiable, and therefore the officer did not have a reasonable basis for a stop); see also People v. Arias, 159 P.3d 134, 138 (Colo. 2007) (holding that, to justify a traffic stop, "there must be more than a possibility that the driver's vision is obstructed"). Therefore, it is seemingly wrong to conclude that the officers had reasonable suspicion to stop the vehicle. A mere "instinct" or "thought" is not enough to stop and seize a vehicle for an alleged equipment matter that violates the law. Because the stop could be illegal, the fruit of the stop, here the weapon recovered, would be subject to suppression. Heapy, 113 Hawai'i at 286, 151 P.3d at 767.

II.

Petitioner points out that in deciding that there was substantial evidence that Tavares had constructive possession of the weapon found inside the car, the ICA held as follows:

In this case, viewing the evidence in the light most favorable to the prosecution, Tavares' close proximity to the handgun, the fact that he both owned and drove the car at the time the handgun was found, the undisputed fact that the handgun was in plain view, and the lack of evidence that either [Orrin] Simer [(Simer)] or [Frank] Hampp [(Hampp)] exercised dominion or control over the handgun constitutes substantial circumstantial evidence [sic] that Tavares had the power and intent to exercise dominion and control over the handgun. In our [ICA] view and considering the cases that have addressed similar circumstances, the evidence linking Simer to Officer Valorosa's class ring is too attenuated to be evidence 'explicitly linking' the handgun to Simer at the time the handgun was discovered in Tavares' vehicle.

State v. Tavares, No. CAAP-11-0000392, 2013 WL 3364105 at *8 (Haw. App. June 28, 2013) (emphasis added).

"[W]hen the appellate court passes on the legal sufficiency of [the] evidence to support a conviction" the test is "whether there was substantial evidence to support the conclusion of the trier of fact." State v. Pone, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion." Id. (internal quotation marks and citations omitted) (emphasis added).

"Where actual possession of the item is not at issue, [(which it is not in the instant case)], the State must prove a sufficient nexus between the defendant and the item in order to establish constructive possession of the item." State v. Foster, 128 Hawai'i 18, 26, 282 P. 3d 560, 568 (2012). This nexus must "'permit an inference that the accused had both the power and the intent to exercise dominion and control over the item. Mere proximity is not enough.'" Id. (quoting State v. Moniz, 92 Hawai'i 472, 476, 992 P.2d 741, 745 (App. 1999) (brackets omitted). Further, "'[t]he defendant's ownership or right to the possession of the place where the [items] were found, alone, [is] insufficient to support a finding of the exercise of dominion and control.'" Id. (quoting Moniz, 92 Hawai'i at 476-77, 992 P.2d at 745-46). Thus, "'dominion over the vehicle alone cannot

establish constructive possession of a weapon in the vehicle[.]’”
Id. at 33, 282 P.3d at 575 (Acoba, J., concurring) (quoting
United States v. Wright, 24 F.3d 732, 735 (5th Cir. 1994)).

In the instant case, the only connections made between Tavares and the gun were that Tavares was the owner of the car and was in close proximity to the weapon. Officer Lucas-Medeiros only testified that the butt end of the handgun sticking out from beneath Tavares’ seat was in his plain view. On the other hand, Tavares testified that he did not know there was a firearm in the vehicle. The fact that the gun may have been in plain view of the officer would not indicate that Tavares exercised dominion and control over the item. See Foster, 128 Hawai‘i at 30, 282 P.3d at 572 (majority opinion) (holding that a defendant’s knowledge that his passengers brought a firearm into his vehicle did not establish that he intended to exercise dominion and control over the firearm). And simply because Tavares was the car’s owner, and was in close proximity to the weapon, does not mean he was aware of the presence of contraband or that this was sufficient to establish that Tavares had the intent to exercise dominion and control over the weapon, especially since he was not the sole occupant of the vehicle.

The ICA did not discuss the behavior of the other two car occupants except to note that “the evidence linking Simer to [the] class ring is too attenuated to be evidence explicitly

linking the handgun to Simer at the time the handgun was discovered in Tavares' vehicle." Tavares, 2013 WL 3364105 at *8 (internal quotation marks omitted). Simer and Hampp were also in the vehicle. The court did not make any findings or conclusions as to their actions with respect to the stop of the vehicle or the possession of the weapon. However, Hampp was in the back seat bending down and leaning forward prior to the stop. Simer was seated in the front passenger seat and in possession of burglar-type materials. Simer had pawned the ring that was stolen from the same Officer whose stolen gun was found beneath the driver's seat. Simer, thus, was distinctly linked to the weapon. Also at the time of the stop, Simer exited the vehicle by passing over Tavares' seat. Tavares states in his Application that he testified that Simer could have moved the gun under the driver's seat after the car stopped or Hampp could have slipped it underneath the driver's seat from the back seat.

When there is evidence that one of the other occupants in the car had a connection to the gun, it does not seem reasonable and prudent to conclude that the driver possessed the weapon solely because he was the owner of the car and was in close proximity to the weapon. In the instant case, "there is no indication in the evidence that Petitioner 'exercised restraining or directing influence' over the gun[.]" Foster, 128 Hawai'i at 32, 282 P.3d at 574 (Acoba, J., concurring) (quoting Moniz, 92

Hawai'i at 481, 992 P.2d at 750). In fact, "there was no evidence whatsoever that [Tavares] ever touched, handled, or interacted with the [gun.]" Id. Therefore, there is a grave question of whether Tavares should have been convicted of knowing possession of the firearm and ammunition.

Under the Hawai'i Penal Code, a defendant can be liable for the voluntary act of possession if "'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.'" Id. at 31, 282 P.3d at 573 (quoting Hawai'i Revised Statutes (HRS) § 702-202). "'Control' is defined as '[t]o exercise restraining or directing influence over,' or, similarly, as 'to exercise restraining or directing influence over something.'" Id. (brackets omitted) (quoting Moniz, 92 Hawai'i at 481, 992 P.2d at 750 (Acoba, J., concurring)). As in Foster, "the evidence in this case does not establish that Petitioner exercised restraining or directing influence over the [gun] and ammunition[.]" Id. at 32, 282 P.3d at 574. It would not appear that a reasonable person exercising caution, Pone, 78 Hawai'i at 265, 892 P.2d at 458, would infer merely from Tavares's ownership of the car and his proximity to the weapon that he had the power to exercise dominion and control over the item, especially in light of evidence plainly tying Simer to the weapon and Hampp's

suspicious movement in the back seat prior to the stop. Under the circumstances, I believe this case warrants further review. HRS § 602-59. Accordingly, I would accept the application for certiorari.

DATED: Honolulu, Hawai'i, December 19, 2013.

/s/ Simeon R. Acoba, Jr.

Associate Justice

