IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

JOHN WALTON, Petitioner/Defendant-Appellant.

SCWC-11-0000667

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000667; CR NO. 09-1-0498)

FEBRUARY 14, 2014

CONCURRING OPINION TO PART II BY
RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

The majority concludes that "it is unnecessary to decide whether, under the circumstances presented here, Walton possessed a reasonable expectation of privacy in his name because the introduction of that evidence at trial was plainly harmless." Majority Op. at 81-82. In my view, however, the circuit court correctly denied Walton's motion to suppress identification

evidence obtained from the business records of General Nutrition Center (GNC) because Walton had no reasonable expectation of privacy in his name in the circumstances of this case.

Walton argues that the police conducted an illegal search in using a GNC card found in a backpack recovered from the complaining witness's (CW) taxi to obtain his name.[1] The GNC card did not include Walton's name on its face, but included a membership number. Detective Ogawa then contacted a local GNC franchise and learned that the card's membership number was registered in Walton's name.

Walton argues that in contacting GNC to obtain his name, without a warrant specifically authorizing such an inquiry, the police violated the Fourth Amendment of the United States Constitution and article 1, section 7, of the Hawaiʻi Constitution. Specifically, Walton argues that he had a "reasonable expectation of privacy in the information on his GNC card as being protected by the Hawaii Constitution's enshrinement of privacy rights for non-regulated documents concerning his personal affairs." Walton's argument is unfounded because he had no reasonable expectation of privacy in the information obtained from GNC, i.e., his name.

[1] Although Walton claims that the police also obtained his address from GNC's records, Detective Ogawa testified only that he obtained Walton's name from GNC.

"It is well settled that an area in which an individual has a reasonable expectation of privacy is protected by the fourth amendment of the United States Constitution and by article 1, § 7 of the Hawaiʻi Constitution and cannot be searched without a warrant." State v. Biggar, 68 Haw. 404, 407, 716 P.2d 493, 495 (1986) (citing Katz v. United States, 389 U.S. 347 (1967)); State v. Wong, 68 Haw. 221, 708 P.2d 825 (1985); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977)). When a governmental intrusion does not invade an individual's legitimate expectation of privacy, however, there is no "search" subject to the Warrant Clause. State v. Meyer, 78 Hawaiʻi 308, 312, 893 P.2d 159, 163 (1995). In determining whether an individual's expectation of privacy brings the governmental activity at issue within the scope of constitutional protection, this court employs a two-part test. First, the person must exhibit an actual, subjective expectation of privacy. Second, that expectation must be one that society would recognize as objectively reasonable. State v. Hauge, 103 Hawaiʻi 38, 50-51, 79 P.3d 131, 143-44 (2003). The question here is whether Walton's name, standing alone, is entitled to protection under the Fourth Amendment of the United States Constitution and article 1, section 7, of the Hawaiʻi Constitution.

As courts have recognized, "not all information about a person is private in the Fourth Amendment sense." Commonwealth

v. Duncan, 817 A.2d 455, 463 (Pa. 2003) (quoting Wayne R. LaFave, 1 Search and Seizure § 2.7(c) (5th ed. 2012)); State v. Chryst, 793 P.2d 538, 541-42 (Alaska Ct. App. 1990) (same). Thus, allowing law enforcement agents "to consult business records that merely [reveal] a person's name or address or telephone number . . . does not offend any interests protected by the Fourth Amendment." Duncan, 817 A.2d at 463 (quoting LaFave, 1 Search and Seizure § 2.7(c)); Chryst, 793 P.2d 538 (same).

In Duncan, for example, the Supreme Court of Pennsylvania confronted a situation directly analogous to the one presented here. In that case, police learned that the defendant, who was suspected of raping a woman, had attempted to make a purchase using an ATM card. Duncan, 817 A.2d at 457. Without obtaining a warrant, the police called the bank that issued the ATM card and learned the defendant's name and address. Id. The defendant was later arrested and charged in connection with the rape. Id. Defendant then sought to suppress blood, bodily fluid, and hair samples, and an out-of-court identification that had been obtained by the police, arguing that the name and address information disclosed by the bank was protected under a state constitutional right of privacy, and that the evidence was therefore the fruit of an unconstitutional search. Id.

In rejecting this argument, the Duncan court noted that the "police asked the bank only for the name and address that

corresponded to the [defendant's] ATM card number — which the police had already obtained from a third party — and the bank gave them only that information." Id. at 462 (emphasis in original). The court further observed that the police

> did not seek evidence of a crime reposing hidden within the bank's financial documents. Rather, they were looking for the mere identity of the person they had strong reason to believe had forcibly raped a woman, and who had attempted to use a precisely identified ATM card. To that end, they telephoned appellant's bank, and were told his name and address.

Id. (emphasis in original).

The court explained that a "person's name and address do not, by themselves, reveal anything concerning his personal affairs, opinions, habits or associations." Id. at 463 (quotation marks omitted). The court concluded, therefore, that the defendant did not have a right of privacy in the name and address information disclosed by his bank to the police. Id.[2]

Here, Walton did not have a reasonable expectation of privacy in the information obtained from GNC, i.e., his name. Like in Duncan, the police obtained only the name associated with the GNC card; the police had recovered that card after searching

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[2] The Duncan court distinguished its prior decision in Commonwealth v. DeJohn, 403 A.2d 1283 (1979), in which the court had held that bank customers have a legitimate expectation of privacy in records pertaining to their affairs kept at a bank. Duncan, 817 A.2d at 463. In DeJohn, the Pennsylvania Supreme Court rejected the analysis set forth by the Supreme Court in United States v. Miller, 425 U.S. 435, 443 (1976), in which the Court held that a defendant has no reasonable expectation of privacy in his personal bank records. DeJohn, 403 A.2d at 1290. In State v. Klattenhoff, 71 Haw. 598, 605-06, 801 P.2d 548, 552 (1990), this court adopted the rule set forth in Miller. However, the holding in Klattenhoff is not implicated in the instant case because the police obtained only Walton's name from GNC, and not any information relating to his private affairs.

a backpack abandoned at the scene of the crime. The police did not seek evidence from GNC relating to the stabbing of CW or Walton's activities at GNC, they merely sought to determine the identity of the person associated with the GNC card, and that is all the police obtained from GNC. In these circumstances, Walton had no reasonable expectation of privacy in the information obtained from GNC.

Moreover, Walton failed to demonstrate that he had both a subjective expectation of privacy in his name, and that such an expectation is one that society would recognize as objectively reasonable. See Hauge, 103 Hawaiʻi at 50-51, 79 P.3d at 143-44. With respect to the subjective prong of this test, Walton offered no evidence that he believed that GNC would keep his name private, nor did he offer any evidence suggesting that GNC customers generally expect the names associated with membership cards to be kept private.[3] See Duncan, 817 A.2d at 464. Walton also failed to demonstrate that any subjective expectation of privacy he may have held in his name is one that society would

[3] This case is therefore distinguishable from other cases in which individuals took affirmative steps to protect their anonymity. See, e.g., People v. Chapman, 679 P.2d 62, 67-68 (Cal. 1984) ("by affirmatively requesting and paying an extra service charge to the telephone company to keep her unlisted information confidential, respondent took specific steps to ensure greater privacy than that afforded other telephone customers"), disapproved on other grounds by People v. Palmer, 15 P.3d 234 (Cal. 2001); State v. Butterworth, 737 P.2d 1297, 1300 (Wash. Ct. App. 1987) (noting that individual "specifically requested privacy regarding his address and telephone number in asking for an unpublished listing").

recognize as objectively reasonable. As the court explained in Duncan,

> Whether registering to vote, applying for a driver's license, applying for a job, opening a bank account, paying taxes, etc., it is all but impossible to live in our current society without repeated disclosure of one's name and address, both privately and publicly. There is nothing nefarious in such disclosures. An individual's name and address, by themselves, reveal nothing about one's personal, private affairs. Names and addresses are generally available in telephone directories, property rolls, voter rolls, and other publications open to public inspection. In addition, it has become increasingly common for both the government and private companies to share or sell name and address information to unaffiliated third-parties. . . . In this day and age where people routinely disclose their names and addresses to all manner of public and private entities, this information often appears in government records, telephone directories and numerous other documents that are readily accessible to the public, and where customer lists are regularly sold to marketing firms and other businesses, an individual cannot reasonably expect that his identity and home address will remain secret-especially where, as here, he takes no specific action to have his information treated differently and more privately.

817 A.2d at 465-66.

For the foregoing reasons, Walton did not have a reasonable expectation of privacy in the information (i.e., his name) obtained by the police from GNC. The circuit court therefore correctly denied Walton's motion to suppress with respect to the information obtained from GNC.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama