IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

RACHEL VIAMOANA UI,
Petitioner/Defendant-Appellant.

SCWC-15-0000402

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000402; CASE NO. 3DTA-11-02996)

MAY 16, 2018

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

I agree with the Majority's conclusion that State v. Won, 137 Hawaiʻi 330, 372 P.3d 1065 (2015), provides no basis on which to vacate Ui's conviction. However, I write separately because I cannot join the Majority's decision to sua sponte review this case for plain error based on the district court's

failure to engage Ui in a Murray colloquy. I continue to believe that this court should exercise sua sponte plain error review sparingly and only in exceptional circumstances. State v. Miller, 122 Hawaiʻi 92, 146, 223 P.3d 157, 211 (2010) (Nakayama, J., dissenting). I further believe that the facts of this case do not rise to that level.

For this reason, I respectfully dissent.

I. BACKGROUND

On October 11, 2011, the State filed a complaint against Ui, alleging that on April 13, 2011, Ui: 1) operated a vehicle on a public highway while under the influence of an intoxicant (OVUII) in violation of Hawaiʻi Revised Statutes (HRS) § 291E-61(a);[1] and 2) operated a vehicle without a license in violation of HRS § 286-102(b).[2]

---

[1] HRS § 291E-61(a) (Supp. 2011) provides:

> (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
> (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
> (2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;
> (3) With .08 or more grams of alcohol per two hundred ten liters of breath; or
> (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

[2] HRS § 286-102(b) (2007) provides in relevant part:

> (b) A person operating the following category or combination
> (continued...)

At the bench trial in the district court, several witnesses for the State testified to the events that occurred on April 13, 2011. The State first called Jacob Wong (Wong) to testify that he picked Ui up in his truck on the night of the accident and that they spent the next few hours drinking at a bar and then at a harbor. Wong testified that he then drove Ui to Safeway, and that when they were ready to leave, Ui "insisted that she would drive" and that Wong should let her have the keys to his truck. Wong further testified that Ui was driving his truck and that he was a passenger when it hit concrete barriers and flipped over.

Next, the State called a first responder to testify that when he arrived at the accident scene he found Ui "laying on her back next to the driver's side door, unresponsive." Then, the State called a police officer to testify that Ui was transported to Kona Hospital and that the emergency room physician "contacted [him] and stated that he smelled alcohol on the female party." Based on this information, the officer

---

[2](...continued)
of categories of motor vehicles shall be examined as provided in section 286-108 and duly licensed by the examiner of drivers:

. . . .

(3) Passenger cars of any gross vehicle weight rating, buses designed to transport fifteen or fewer occupants, and trucks and vans having a gross vehicle weight rating of fifteen thousand pounds or less[.]

testified that he then initiated the procedure for a mandatory blood draw.

As the State was calling its next witness, the medical technician who performed the blood draw, Ui's counsel interrupted:

> [DEFENSE COUNSEL:] Your Honor, I'm sorry to interrupt. I was speaking with Ms. Ui, and we may be willing to stipulate to certain things to save time with these witnesses.
>
> Ms. Ui's asking me, was asking me if these witnesses are necessary, and I explained to her not if we're willing to stipulate to certain things. And I know that we're trying to get a lot done today. So if I could just briefly speak with her, and maybe the prosecution, about what we'd be willing to stipulate to, to save --
>
> THE COURT: All right.

The State noted that it would rather proceed with its witnesses and try to lay the appropriate foundation, but the court ordered a recess to try to "get such a stipulation in place."

After the recess, Ui's counsel explained to the court that "we have reached an agreement, and I have gone over all the stipulations with Ms. Ui." Ui's counsel then proceeded to stipulate that Ui's blood test was properly drawn and that the results showed a blood alcohol content of 0.156. After stipulating to these facts, Ui's counsel noted: "And I have reviewed those stipulations as well as the exhibits with Ms. Ui, and she understands that they're going to be -- that we're not challenging any of those facts."

At this point, Ui testified on her behalf. Ui

testified that she does not drive and that she does not have a license. Ui testified that Wong was driving on the night of the accident, that she "passed out" in the passenger seat of his truck before the accident took place, and that the next thing she remembered was waking up in a hospital on Oʻahu after the accident.

On cross-examination by the State, Ui testified that she had numerous alcoholic drinks on the night of the accident:

> [THE STATE:] So how much had you had to drink with Jacob [Wong] on April 13?
> [UI:] I had four bottles of Budweiser.
> [THE STATE:] And that's all?
> [UI:] No.
> [THE STATE:] What else did you have?
> [UI:] And then we had about four to five shots that was bought by him.
> [THE STATE:] And this is at the bar?
> [UI:] Yes.
>
> . . . .
>
> [THE STATE:] Okay. So it was the four Buds and then the four or five shots?
> [UI:] Mm-hmm.
>
> . . . .
>
> [THE STATE:] So that was in a period of about an hour and a half. Okay. So then you went to the harbor?
> [UI:] Yes.
> [THE STATE:] Okay. How much did you drink at the harbor?
> [UI:] I'm not sure, but we had a bottle about that big.
> [THE STATE:] Of what?
> [UI:] And there were four of us, so we were just --
> [THE STATE:] What was the bottle of?
> [UI:] Parrot Bay Rum.
> [THE STATE:] Rum. Okay. How many shots did you drink of the -- or how much did you drink from the Parrot Bay Rum bottle?
> [UI:] I'm not sure. It went around about four times.
> [THE STATE:] And did you take big drinks of those --
> [UI:] No.
> [THE STATE:] -- big drink of that? Was it mouthful?

> [UI:] Just take swigs.
> [THE STATE:] Swigs. Okay. How long were you at the harbor for?
> [UI:] About forty-five minutes.
>
> . . . .
>
> [THE STATE:] And the entire time there you were drinking?
> [UI:] Mm-hmm.
> [THE STATE:] And then you went to Safeway?
> [UI:] Yes.
>
> . . . .
>
> [THE STATE:] Okay. So do you think you were really drunk at Safeway?
>
> . . . .
>
> [UI:] I'd say.
> [THE STATE:] You were really drunk?
> [UI:] Not really, really drunk, but like buzzing.
> [THE STATE:] But you passed out?
> [UI:] At Safeway.
> [THE STATE:] You passed out in the car at Safeway?
> [UI:] Yeah.
> [THE STATE:] Okay. So you were really drunk?
> [UI:] Yeah.

In his closing argument, Ui's counsel explained that "Ms. Ui is really not contesting that she was drinking. She's not contesting that she was involved in the accident. But she certainly is adamant about the fact that she wasn't driving."

The district court found Ui guilty of both the OVUII and driving without a license offenses. Ui appealed to the ICA, which affirmed her OVUII conviction under HRS § 291E-61(a)(4). In her application for writ of certiorari challenging the ICA's decision to affirm her OVUII conviction, Ui did not raise any error with respect to the blood test stipulation. However, this court directed the parties to submit supplemental briefing on

whether the district court erred in failing to engage Ui in a colloquy regarding the blood test stipulation pursuant to State v. Murray, 116 Hawaiʻi 3, 169 P.3d 955 (2007).

II. DISCUSSION

The Majority concludes that the district court plainly erred in allowing Ui to stipulate regarding the blood test without conducting a colloquy with Ui pursuant to Murray. Majority at 22. I respectfully disagree.

I continue to believe that "[t]his court's power to deal with plain error is one to be exercised sparingly and with caution." Miller, 122 Hawaiʻi at 146, 223 P.3d at 211 (Nakayama, J., dissenting). This is so because "the plain error rule represents a departure from a presupposition of the adversary system—that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes." State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993).

Accordingly, this court's power to exercise plain error sua sponte should be exercised even more sparingly and only in exceptional cases.[3] See State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 675-76 (1988) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been

[3] "Sua sponte" is Latin for "of one's own accord." Sua sponte, Black's Law Dictionary (10th ed. 2014).

taken . . . .") (formatting altered) (emphasis added); State v. Ruiz, 49 Haw. 504, 506, 421 P.2d 305, 308 (1966) ("The power to notice error on the court's own motion will be exercised only in an exceptional case.") (emphasis added). This heightened standard is appropriate because:

> When an appellate court notices plain error sua sponte, it departs from the position usually presupposed by the adversary system that a party must look to his counsel to protect him and that he must bear the costs of the mistakes of his counsel twice: first, when the counsel failed to preserve the error at the lower court and, subsequently, when the counsel failed to argue the plain error on appeal.

Miller, 122 at 139, 223 P.3d at 204 (Nakayama, J., dissenting) (quotation marks omitted) (emphasis in original).

Here, the Majority argues that sua sponte plain error review is required in this case because failing to conduct a colloquy with Ui regarding her stipulation to the blood test results deprived her of her fundamental rights. Majority at 28-29. In concluding so, the Majority states, "[o]ur precedents do not permit a reviewing court to infer that a fundamental right was knowingly, voluntarily, and intelligently relinquished by a defendant simply because defense counsel suggested that the right was so waived." Majority at 30.

But in my view, exercising sua sponte plain error review requires a more careful analysis based on the record in each case. Cf. State v. Apollonio, 130 Hawaiʻi 353, 370, 311 P.3d 676, 693 (2013) (Recktenwald, C.J., concurring and

dissenting). And on the facts of this particular case, the failure of the district court to engage Ui in a colloquy does not rise to the "exceptional circumstances" I would require in order to notice plain error sua sponte. This is especially true when our decision in State v. Pratt, 127 Hawaiʻi 206, 277 P.3d 300 (2012), not Murray, appears more applicable to this case.

In Pratt, this court considered whether Pratt had violated a state regulation prohibiting the unpermitted camping in a closed area of a state wilderness park. Id. at 208, 277 P.3d at 302. At a pretrial motion to dismiss hearing, Pratt testified that he lived in the park without a permit but that his actions were constitutionally protected as a native Hawaiian practice. Id. The trial court denied Pratt's motion to dismiss and, prior to trial, the parties stipulated to the essential facts to establish that Pratt had violated the regulation.[4] Id. at 210, 277 P.3d at 304. At trial, Pratt focused his efforts on the affirmative defense that he had a constitutionally protected right as a native Hawaiian to conduct traditional native Hawaiian activities on the land. Id. The trial court convicted Pratt of violating the regulation. Id. at 211, 277 P.3d at 305.

On appeal before this court, the Dissent argued that this court should exercise sua sponte plain error review on the

[4] This stipulation was in writing and signed by Pratt. Id. at 213, 277 P.3d at 307.

grounds that there was no on-the-record colloquy in which Pratt waived his right to have the prosecution prove each element of the offense, and that the stipulation did not satisfy this requirement under Murray. Id. at 221-22, 277 P.3d at 315-16 (Acoba, J., concurring and dissenting). However, the Majority declined to invoke sua sponte plain error to invalidate the parties' stipulation, explaining that this court's prior decision in Murray was inapposite because in Murray, the stipulation was made "solely by counsel," whereas in Pratt, Pratt himself was "on the record as personally admitting to the essential facts supporting conviction." Id. at 213, 277 P.3d at 307 (citing Murray, 116 Hawaiʻi at 5, 169 P.3d at 957).

The stipulation in the current case similarly reflects a decision by Ui herself to concede that she was intoxicated at the time of the accident. The record evinces that, contrary to the facts in Murray, this was not a unilateral decision made by Ui's counsel. On the contrary, Ui's counsel interrupted the State's calling of the medical technician to state, "Ms. Ui's asking me, was asking me if these witnesses are necessary, and I explained to her not if we're willing to stipulate to certain things." Ui's counsel then requested and was granted a recess to speak with Ui about the stipulation. Upon returning from the recess, Ui's counsel explained to the court that "we have reached

an agreement, and I have gone over all the stipulations with Ms. Ui." After the stipulations were read, Ui's counsel noted again that he "reviewed those stipulations as well as the exhibits with Ms. Ui, and she understands that they're going to be -- that we're not challenging any of those facts."

Although there is no written stipulation signed by Ui, as was the case in Pratt, the record reflects that Ui wanted to stipulate, initiated the stipulation, discussed the stipulation and its effects with her attorney, and ultimately agreed to it. Ui made this decision after hearing testimony from Wong, in which he recounted drinking with Ui on the night of the accident, and from the police officer, in which he testified that he ordered a mandatory blood draw of Ui after receiving a report from the ER physician that Ui smelled of alcohol. On the basis of these facts, I cannot see how the district court's "error in fact affected the defendant's substantial rights." Miller, 122 Hawaiʻi at 145, 223 P.3d at 210 (Nakayama, J., dissenting) (emphases in original).[5]

Finally, I continue to maintain my concern that the Majority's reliance on Murray in this case further erodes the

[5] Moreover, the record reveals that Ui personally admitted to drinking heavily on the night of the accident. For instance, Ui testified that she consumed four beers and four to five shots in the span of an hour and a half on the night of the accident, had about four more shots about an hour after that, was "really drunk" and "passed out" in the car at Safeway, and cannot remember anything about the accident or its aftermath.

relationship between an attorney and her client, imposes unreasonable duties upon the court, and intrudes upon the adversarial nature of the trial process:

> A court is not obligated to engage in a mandatory colloquy with every defendant to ensure that he, notwithstanding his counsel's silence or conduct, knowingly and intelligently waived each and every one of his constitutional rights. [Tachibana v. State, 79 Hawaiʻi 226, 241, 900 P.2d 1293, 1308 (1995)] (Nakayama, J., dissenting). It is instead primarily the obligation of counsel to advise a defendant on whether to waive his constitutional rights, and the tactical advantages and disadvantages of each choice. Id.

Murray, 116 Hawaiʻi at 22, 169 P.3d at 974 (Nakayama, J., dissenting).

III. CONCLUSION

Because I believe that sua sponte plain error review is not warranted by the facts of this case, I would affirm the ICA's judgment to the extent that it affirmed Ui's OVUII conviction under HRS § 291E-61(a).

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama