

CONCURRING OPINION BY GINOZA, J.

I concur that the circuit court's May 21, 2012 Findings of Fact, Conclusions of Law, and Order Granting Motion to Suppress Evidence (Order) and the July 19, 2012 Order Denying State's Motion for Reconsideration of Court's [Order] (Reconsideration Order) should be vacated. However, I would remand back to the circuit court for further proceedings on the motion to suppress to clarify essential findings of fact related to the motion.

The circuit court concluded that, given the circumstances of this case, the "open view" doctrine applied, Defendant-Appellee Richard K. Myers (Myers) had a reasonable expectation of privacy in the shopping bag between his legs, and thus Officer Tomita was required to obtain a warrant before seizing the ziplock bag that Myers had dropped into the shopping bag. On appeal, Plaintiff-Appellant State of Hawai'i (State) contends that "Myers did not assert a reasonable expectation of privacy when handling the clear plastic packet of crystal meth in the middle of the morning in a public park."

The record in this case is unclear because in its May 21, 2012 Order, the circuit court found that, after Officer Tomita observed Myers from approximately ten (10) feet away shaking a small ziplock bag which appeared to contain crystal methamphetamine, Officer Tomita approached Myers, Myers dropped the ziplock bag into a red shopping bag located between his legs, and after arriving at Myers' location "Officer Tomita stood over [Myers] and observed the small, ziplock bag and other contents within the red, shopping bag." In short, the circuit court initially found that upon approaching Myers and standing over him, Officer Tomita could observe the ziplock bag within the shopping bag.

However, at the June 7, 2012 hearing on the State's motion for reconsideration, the circuit court appears to have revised its determination as to whether Officer Tomita could see into the shopping bag, stating:

There has been conflicting testimony on the location of the clear plastic packet. The officer testified that it was directly on top of the bag's contents, the defendant testified that it was under the newspaper or out of view. Given that the bag was between the defendant's legs as he sat on the ground, the Court can only conclude the defendant - - the officer was actually unable to see the bag's contents from his vantage point when he approached the defendant.

(Emphasis added). In its July 19, 2012 Reconsideration Order, the circuit court made further findings, but did not expressly address whether Officer Tomita could see into the shopping bag, unlike in its May 21, 2012 Order.

In its briefing on appeal, the State frames its arguments based on facts presuming that Officer Tomita could see into the shopping bag after he approached Myers. Myers, in turn, sets forth arguments under both scenarios, that Myers made no attempt to conceal the contents of the shopping bag, yet also arguing that the circuit court had found that Officer Tomita was unable to see the contents of the shopping bag.

In State v. Meyer, 78 Hawai'i 308, 893 P.2d 159 (1995), the Hawai'i Supreme Court described the "open view" doctrine as follows:

[I]n an open view sighting, a police officer observes something illicit from a public vantage point. There is no intrusion present because, in theory, the object or activity is something any member of the public could themselves observe. In [State v. Bonnell, 75 Haw. 124, 856 P.2d 1265 (1993)], this court noted that

we have held that, where the object observed by the police is in open view, it is not subject to any reasonable expectation of privacy, and the observation is not within the scope of the constitution.... In the open view situation, ... the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside at that which is knowingly exposed to the public.

[Id.] at 144, 856 P.2d at 1276 (internal quotation marks and citations omitted).

In legitimate open view sightings, the warrantless seizure of the evidence in question depends on whether the item is in a constitutionally protected area. If the evidence is not in an area where there is a reasonable expectation of privacy, that is, if it is located in a common space, such evidence is subject to seizure by the governmental agent who spots it, without the necessity of a

warrant or exigent circumstances. "If a police officer sees probable evidence in open view in a constitutionally non-protected area, he or she may, of course, seize it. He or she seizes it because there is no constitutional provision to gainsay the seizure." State v. Hook, 60 Haw. 197, 201, 587 P.2d 1224, 1228 (1978) (citation omitted).

However, if the evidence in question is in open view in an area in which the evidence retains its constitutional protection, a warrant is required or exigent circumstances must exist before the object may be seized. "Visibility of contraband within constitutionally protected premises is not enough to justify entry and seizure without a warrant." Id. at 202, 587 P.2d at 1228.

78 Hawai'i at 313, 893 P.2d at 164 (emphasis added) (brackets omitted). In this case, Myers initially held the ziplock bag out in the open where anyone passing by could see it, but then dropped it into the shopping bag as Officer Tomita approached. The crucial issue is whether the shopping bag was a constitutionally protected area. Because the State does not argue any exigent circumstances existed in this case, if the shopping bag was a constitutionally protected area, a warrant would have been required to seize the ziplock bag within it.

Whether Officer Tomita could see the ziplock bag within the shopping bag from his vantage point after approaching Myers is a significant factor as to whether the shopping bag was a constitutionally protected area. In this regard, as noted by the majority, there is no reasonable expectation of privacy when a container is open or transparent and reveals its contents. See United States v. Epps, 613 F.3d 1093, 1098 n.2 (11th Cir. 2010) (recognizing the continuing validity of the principle expressed by the United States Supreme Court in Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979) that there is no reasonable expectation of privacy in a container that discloses its contents); United States v. Meada, 408 F.3d 14, 23 (1st Cir. 2005) ("[S]ome containers so betray their contents as to abrogate any [reasonable] expectation [of privacy]."); United States v. Huffhines, 967 F.2d 314, 319 (9th Cir. 1992); United States v. Donnes, 947 F.2d 1430, 1437 (10th Cir. 1991) ("[W]hen a container is 'not closed,' or 'transparent,' or when its 'distinctive

configuration . . . proclaims its contents,' the container supports no reasonable expectation of privacy" (citation omitted).

The State relies on the circuit court's initial finding that Officer Tomita could see the ziplock bag within the shopping bag, given the circuit court's May 21, 2012 Order. Nonetheless, the circuit court's oral ruling appears to have revised its finding in this regard, but without further elaboration in its July 19, 2012 Reconsideration Order. Pursuant to Rule 12(e) of the Hawai'i Rules of Penal Procedure, "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record." The Hawai'i Supreme Court has held that "[b]ecause ... findings [of fact] are imperative for an adequate judicial review of a lower court's conclusions of law, we have held that cases will be remanded when the factual basis of the lower court's ruling cannot be determined from the record." State v. Hutch, 75 Haw. 307, 331, 861 P.2d 11, 23 (1993) (internal quotation marks and citations omitted); see also State v. Anderson, 67 Haw. 513, 514, 693 P.2d 1029, 1030 (1985) (reviewing a trial court's ruling on a motion to suppress and holding that "we need a more detailed record of factual findings in order to conduct our inquiry.") (brackets and citations omitted).

Therefore, to clarify the record on this crucial point, I would remand the case to the circuit court for further proceedings on the motion to suppress and instruct the circuit court to clarify its findings whether Officer Tomita could or could not observe the ziplock bag within the shopping bag after he approached Myers. A clear finding on this point would allow the parties to challenge the finding if they so choose, and would also provide this court with a clear record upon which to determine an appeal.