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Supreme Court
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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

PULUMATA'ALA ELI, Petitioner/Defendant-Appellant.

NO. SCAP-30420

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(ICA NO. 30420; FC-CR NO. 07-1-0066)

APRIL 13, 2012

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

I join in Justice Nakayama's dissent, but write separately to address the majority's holding that the post-Miranda confession given by petitioner/defendant-appellant Pulumata'ala Eli was the "fruit of the poisonous tree" and therefore should have been suppressed. In my view, even assuming arguendo that the detective should have given Miranda warnings to Eli before asking if he was willing to be interviewed, Eli's

confession should not be suppressed. The confession was not obtained from the exploitation of Eli's response that he was willing to make a statement, and is therefore not fruit of the poisonous tree. Accordingly, I respectfully dissent.¹

This court has held, "As for the suppression of derivative evidence, the fruit of the poisonous tree doctrine prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act of the police." State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997) (citation and quotation marks omitted) (emphasis added). In State v. Joseph, this court explained:

As applied to confessions, the "fruit of the poisonous tree" doctrine holds that where one confession or admission is illegally obtained and subsequently the defendant makes a further confession, the second confession is inadmissible in evidence as a "fruit of the poisonous tree" if it results from an exploitation of the prior illegality. However, a confession made subsequent to an inadmissible one is not automatically inadmissible. Where a confession has been illegally obtained, the government will not be allowed to introduce into evidence a subsequent confession unless it first demonstrates that the latter was not obtained by exploiting the initial illegality or that any connection between the two had become so attenuated that the taint was dissipated.

109 Hawai'i 482, 499, 128 P.3d 795, 812 (2006) (quoting State v. Pebria, 85 Hawai'i 171, 175, 938 P.2d 1190, 1194 (App. 1997)) (emphasis added).

As the majority acknowledges, both State v. Luton, 83 Hawai'i 443, 927 P.2d 844 (1996), and Joseph provide guidance in

¹ However, I concur in Part III of the Majority Opinion, which rejects Eli's argument that any statements obtained after an unrecorded waiver should be per se inadmissible where recording was feasible.

the instant case. In Luton, this court held that a defendant's post-Miranda confession was admissible because it did not result from the exploitation of a prior, illegal confession. 83 Hawai'i at 455, 927 P.2d at 856. There, the police received a report of a stabbing in Waikiki. Id. at 446, 927 P.2d at 847. The victim's daughter stated that she saw a black male with a ponytail run out of her mother's bedroom. Id. An officer spotted defendant Luton, who matched the description, and attempted to speak with him. Id. Luton fled into the ocean. Id. Officers then apprehended Luton and brought him ashore. Id. While he was being arrested, Officer Medeiros heard Luton say: "We've all got to make a living somehow, I needed the money, just kill me already. . . . I didn't do it, it was someone else." Id. Officer Medeiros then questioned Luton about the stabbing incident and Luton responded that a person named "Max" committed the offense. Id. The next day, Luton was informed of his constitutional rights, waived them, and confessed to the stabbing. Id. at 447, 927 P.2d at 848. Luton was subsequently charged with murder in the second degree and burglary in the first degree. Id. Luton filed a motion to suppress the evidence, arguing that his statements to the officers were not voluntary. Id. The circuit court suppressed Luton's pre- and post-Miranda admissions. Id. The State only appealed the circuit court's suppression of Luton's post-Miranda statement. Id. On appeal, Luton argued that his pre-Miranda admissions

tainted his subsequent confession and, therefore, the waiver of his constitutional rights was ineffective. Id. at 454-55, 927 P.2d at 855-56. This court disagreed and held:

[T]here [wa]s no indication in the record that HPD detectives exploited Luton's illegally obtained statements to Officer Medeiros. Nor [wa]s there evidence to support a claim that officers used those statements to induce Luton into making a confession. The transcripts and the videotaped interview of Luton with Detectives Kinimaka and Dung [we]re devoid of any mention of the admissions Luton made on the beach. Therefore, we do not agree with Luton that his "subsequent statements . . . flowed from the fact that the initial incriminating statements [made to Officer Medeiros] had already been obtained" We hold that Luton's waiver was not predicated on the statements made to Officer Medeiros.

Id. at 455, 927 P.2d at 856 (emphasis added).

In contrast, this court held in Joseph that a post-Miranda confession was inadmissible as fruit of the poisonous tree. 109 Hawai'i at 499, 128 P.3d at 812. There, the detective conducted a pre-Miranda interview with defendant Joseph that lasted "approximately twenty-two minutes," which involved questioning about the incident for which Joseph was being detained. Joseph, 109 Hawai'i at 486, 495, 128 P.3d at 799, 808 (citation omitted). After providing incriminating statements in the pre-interview, Joseph was subsequently read his Miranda rights and asked to make a statement on the record. Id. at 499, 128 P.3d at 812. The detective explicitly stated, "[W]e gotta have [the statement] on record." Id. Joseph was subsequently charged with various murder and firearm offenses. Id. at 487-88, 128 P.3d at 800-01. Joseph filed a motion to suppress both the pre- and post-Miranda statements because "neither the statement

nor his waiver of his right to remain silent were voluntarily made." Id. at 488, 128 P.3d at 801. The circuit court suppressed both statements. Id. at 492, 128 P.3d at 805. On appeal of the circuit court's suppression order, the prosecution argued that the circuit court erred in suppressing Joseph's statements. Id. In regard to the post-Miranda statement, this court held that "[t]he pre-interview statements were exploited in that Joseph was subsequently questioned on the same matter in order that he would repeat his earlier statement." Id. at 499, 128 P.3d at 812. Accordingly, this court concluded that the post-Miranda statements were inadmissible. Id.

To summarize, under Luton and Joseph, a post-Miranda statement will be excluded if "it results from the exploitation of the prior illegality[,]" or there is no attenuation to dissipate the taint of any illegally obtained prior confession. Joseph, 109 Hawai'i at 499, 128 P.3d at 812; see also Luton, 83 Hawai'i at 455, 927 P.2d at 856. This court has recognized that exploitation can occur where a prior illegal confession is "used" to "induce" the defendant into making a subsequent confession, and where the subsequent confession is "predicated" on the prior confession. Luton, 83 Hawai'i at 455, 927 P.2d at 856. In addition, this court has recognized that exploitation can occur where the defendant is questioned during his subsequent confession "on the same matter in order that he would repeat his earlier statements." Joseph, 109 Hawai'i at 499, 128 P.3d at

812. I respectfully disagree with the majority's conclusion that such exploitation occurred in the instant case.

First, unlike Luton, there is nothing in the record here to indicate that the detective "exploited" Eli's pre-Miranda response that he was willing to be interviewed, since the detective did not mention Eli's pre-Miranda response in the post-Miranda interview. There is also no indication that the detective used Eli's pre-Miranda response to "induce" Eli's subsequent waiver and confession. Again, there is nothing in the record to show that the detective mentioned Eli's pre-Miranda response in the discussion of Eli's Miranda rights or the post-Miranda interview. Cf. Pebria, 85 Hawai'i at 175-77, 938 P.2d at 1194-96 (affirming the suppression of a post-Miranda confession when the detective: "diligently" tried to get the defendant to confess as he did in a pre-Miranda statement, led the defendant to make an admission based on the defendant's prior statement, and mentioned defendant's prior statement). Similarly, there is no indication in the record that Eli was motivated to give his post-Miranda confession because of his pre-Miranda response that he was willing to be interviewed. To the contrary, Eli stated that he made his confession "for [his] daughter."² Thus, Eli was aware that he had a right not to give a statement, despite his

² Moreover, the Miranda warnings form that Eli signed stated, "If you decide to answer my questions without an attorney being present, you still have the right to stop answering at any time." Eli therefore acknowledged that he had a right to stop the post-Miranda interview at any time.

prior indication that he was willing to do so. Accordingly, as in Luton, the record does not support the conclusion that Eli's waiver of his right to remain silent and subsequent confession was directly "predicated" on his pre-Miranda response to the detective's inquiry. Instead, the record shows that Eli's pre-Miranda response was not exploited in order to obtain his subsequent statement. Luton, 83 Hawai'i at 455, 927 P.2d at 856.

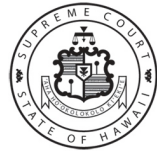
In addition, the instant case is distinguishable from Joseph. In Joseph, the detective explicitly exploited Joseph's pre-Miranda admissions when the detective told Joseph that he needed to restate his pre-Miranda confession "on record." 109 Hawai'i at 499, 128 P.3d at 812. Here, at no time did the detective use Eli's willingness to make a statement to induce Eli to waive his rights or confess. Additionally, in Joseph, the detectives engaged in "twenty-two minutes" of questioning about the incident prior to giving Joseph the Miranda warnings, and the post-Miranda questioning "sought a repetition and expansion of information provided during the pre-Miranda session." Id. at 490, 128 P.3d at 803. In contrast, here, Eli did not confess to the charged offense prior to being read his Miranda rights, and instead only indicated that he was willing to make a statement. Only after being read his Miranda rights did Eli provide the officers with a statement about the incident.

Our cases clearly require that a pre-Miranda statement be exploited before a subsequent post-Miranda statement will be

considered fruit of the poisonous tree. See Luton, 83 Hawai'i at 455, 927 P.2d at 856; Joseph, 109 Hawai'i at 499, 128 P.3d at 812. In the present case, there was no such exploitation of Eli's pre-Miranda response. I would therefore hold that Eli's post-Miranda waiver and confession were admissible because they were not obtained from an exploitation of Eli's pre-Miranda indication that he was willing to make a statement. Accordingly, I would affirm the conviction.³

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama



³ Eli raises several issues relating to sentencing that would need to be addressed if the conviction were affirmed. However, because the majority vacates Eli's conviction and remands for a new trial, I do not address the other issues raised by Eli.