

SCWC-11-0000107

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

BRIAN PAUL SIMON, Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000107; CASE NO. 3DTA-10-00395)

AMENDED DISSENT BY ACOBA, J.

Respectfully, I would accept the application for certiorari because of a patent violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 16¹ and the due process clause in the

¹ HRPP Rule 16 provides, in relevant part:

(b) Disclosure by the prosecution.

(1) Disclosure of matters within prosecution's possession. The prosecutor shall disclose to the defendant or the defendant's attorney the following material and information within the prosecutor's possession or control:

. . . .

(iv) any books, papers, documents, photographs, or tangible objects which the prosecutor intends to introduce, or which were obtained from or which belong to the defendant, or which are material to the preparation of the defense and are specifically designated in writing by defense counsel;

. . . .

Hawai'i constitution, art. 1, § 5.²

I.

Before trial, the District Court of the Third Circuit (district court) orally denied a Motion to Dismiss filed by Petitioner/Defendant-Appellant Brian P. Simon (Simon). In his Motion to Dismiss, Simon had alleged that the evidence obtained by the police concerning his conviction for Operating a Vehicle Under the Influence of an Intoxicant (OUVII) subsequent to a traffic stop should be suppressed, because "[t]here is a lack of evidence in support of probable cause to stop [Simon's] vehicle; and [a]ll subsequent evidence and statements are barred by the doctrine of the 'fruit of the poisonous tree[.]'" As a result, Simon argued, there was insufficient evidence to sustain a conviction.

(vii) any material or information which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the defendant's punishment therefor.

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(d) Discretionary disclosure. Upon a showing of materiality and if the request is reasonable, the court in its discretion may require disclosure as provided for in this Rule 16 in cases other than those in which the defendant is charged with a felony, but not in cases involving violations.

(Emphasis added.)

² Hawai'i constitution art. 1, § 5 provides:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

(Emphasis added.)

The district court ruled that "the [Respondent/Plaintiff-Appellee State of Hawai'i (State)] has established that there was probable cause to effectuate the stop primarily on the basis of the officer's radar device indicating that the defendant was exceeding the posted speed limit by traveling 59 miles per hour in a 35-mile-per-hour zone." (Emphasis added.) The district court went on to state that, "I'll deny the motion to suppress on the basis of probable cause, [and] find that the defense has not provided sufficient evidence to prove by a preponderance of the evidence that there was not sufficient probable cause to effectuate the arrest."

In his Demand for Discovery and Inspection filed on April 15, 2010, Simon had requested, among other items, under the section entitled "Special Request":

1. Any and all manual(s), service instruction(s), warranty information, instructions, operator's manual, maintenance instruction(s)/manuals, or other information for the radar used and operated in this speeding case.

Simon's Amended Demand for Discovery and Inspection, filed on April 21, 2010 listed the same items under the "Special Request" section.

On appeal to the Intermediate Court of Appeals (ICA), Simon contended, inter alia, that the district court erred when it denied him "the right to receive a copy of the operator's manual for the radar device" in response to his motion to Compel Special Request for Production of Documents filed during the

discovery phase prior to trial. The State responded that the district court "did not err in refusing to compel police to provide a copy of the manual to defense counsel when [Simon] was able to examine that manual and was not precluded from taking notes."

The ICA's Summary Disposition Order affirmed the district court's judgment, holding, inter alia, that "the [d]istrict [c]ourt did not abuse its discretion in declining to compel the State to permit Simon to make a copy of the Manual." State v. Simon, 128 Hawai'i 313, 288 P.3d 131 (App. Oct. 26, 2012). In support of its holding on this issue, the ICA cited State ex rel. Marsland v. Ames, 71 Haw. 304, 313-18, 788 P.2d 1281, 1286-88 (1990) and noted in a parenthetical that in Ames, a non-felony case, "the trial court exceeded its authority by ordering the State to disclose manufacturer's manuals for the Intoxilyzer device." The ICA entered its judgment on December 7, 2010.

II.

HRPP Rule 16(d) provides that, "[u]pon a showing of materiality and if the request is reasonable, the court in its discretion may require disclosure as provided for in this Rule 16 in cases other than those in which the defendant is charged with a felony[.]" In State v. Lo, 116 Hawai'i 23, 26, 169 P.3d 975, 978 (2007), this court held that "discovery in a misdemeanor

. . . case may be permitted by the trial judge '[u]pon a showing of materiality and if the request is reasonable,' but only to the extent authorized by HRPP Rule 16 for felony cases[,] i.e., the item sought to be disclosed must be an enumerated item under HRPP Rule 16(b)." Id. (quoting Ames, 71 Haw. at 309, 788 P.2d at 1284) (emphasis added) (some quotation marks omitted). In his application, Simon maintains that "[a] request for the [radar gun manufacturer's] manual does not exceed the felony right to discovery under [HRPP] Rule 16, [] and the right to secure relevant discovery in an excessive speeding [misdemeanor] or [Driving Under the Influence of Intoxicating Liquor (DUI)] case[, misdemeanor charges]."

A.

In my view, first, the district court should have ordered the State to provide Simon with a copy of the manual because the manual was material and the request was reasonable pursuant to HRPP Rule 16. In Lo, the defendant in an excessive speeding case requested the disclosure of the "distance[s] used to calibrate the subject laser unit and the location where the calibration took place." 116 Hawai'i at 25, 169 P.2d at 977. This court affirmed the district court's decision, requiring the State to disclose the calibration information. Id. at 27, 169 P.3d at 979. It reasoned that the material was admissible under

HRPP Rule 16(b)(1)(vii),³ because the calibration information was "material to challenging the accuracy of the laser unit," and if the laser unit was inaccurate, the State would be unable to prove that the defendant had exceeded the speed limit. Id.

In the instant case, the speed reading from the radar gun formed the basis for the stop of Simon. As in Lo, the information contained in the manual would be "material to challenging the accuracy" of the unit. See id. Further, the manual may have also contained information demonstrating that the radar gun reading was taken improperly. Such a demonstration would undermine the basis for the stop, and allow Simon to argue that all of the evidence obtained following the stop should be suppressed. Hence, the manual is a document containing information "material to the preparation" of Simon's defense, and would therefore be discoverable under HRPP Rule 16(b)(1)(iv).⁴

Moreover, this court's decision in Ames is distinguishable from the instant case. In a per curiam opinion, the Ames court held that the district court judge "acted beyond the scope of his jurisdiction pursuant to HRPP Rule 16" when it allowed the defendant to discover 41 of 45 items sought by means

³ Pursuant to HRPP Rule 16(b)(1)(vii), the prosecutor shall disclose to the defendant "any material or information which tends to negate the guilty of the defendant as to the offense charged or would tend to reduce the defendant's punishment therefor."

⁴ Pursuant to HRPP Rule 16(b)(1)(iv), the prosecutor shall disclose to the defendant any documents which "are material to the preparation of the defense."

of pretrial discovery motions, in defending against a charge of DUI. 71 Haw. at 306, 788 P.2d at 1282. The district court had required the prosecution to disclose, inter alia, “[a] copy of the detailed set of instructions pertaining to the operation, calibration, and maintenance of the Intoxilyzer 4011AS.” Id. at 313-14, 788 P.2d at 1286. This court gave no rationale for its determination that the district court had erred in requiring this disclosure, other than to state that “disclosure of these items [is] not provided for in HRPP Rule 16,” and “discovery in a misdemeanor case that exceeds the limits of discovery established by HRPP Rule 16 for felony cases cannot be justified under the rule.” Id. at 313, 788 P.2d at 1286.

In this case, on the other hand, Simon requested far fewer materials than the 45 items at issue in Ames. As discussed supra, the manual at issue was clearly discoverable under HRPP Rule 16(b)(iv), which requires the disclosure of any documents which “are material to the preparation of the defense.” Hence, Simon should have been allowed to view and make a copy of the manual.

B.

Second, prohibiting Simon from making a copy of the manual infringed on his due process right to prepare and present his defense to the criminal charge of OUVII. It is a matter of constitutional due process that a defendant in a criminal

proceeding must be afforded a meaningful opportunity to present a defense on his or her own behalf. See State v. Kaulia, 128 Hawai'i 479, ---, 291 P.3d 377, 385 ("The due process guarantee of the . . . Hawai'i constitution [] serves to protect the right of an accused in a criminal case to a fundamentally fair trial. Central to the protections of due process is the right to be accorded a meaningful opportunity to present a complete defense.'") (quoting State v. Matafeo, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990)); State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) ("The due process guarantee of a fair trial under the fourteenth amendment to the United States Constitution and . . . the Hawai'i Constitution confers upon the accused in criminal proceedings a meaningful opportunity to present a complete defense.")) (internal quotation marks and citation omitted) (emphasis in original).

Discovery is a fundamental part of the process by which a defendant prepares his or her own defense, and thus inequitable discovery violates due process. See State v. Valeros, 126 Hawai'i 370, 378-79, 271 P.3d 665, 673-74 (2012) ("[D]iscovery under HRPP Rule 12.1 is a 'two-way street.'" (quoting State v. Davis, 63 Haw. 191, 194-95, 624 P.2d 376, 379 (1981)); see also State v. Dowsett, 10 Haw. App. 491, 498, 878 P.2d 739, 743 (1994) ("Discovery is at the very foundation of the fact finding process. Faithful adherence to discovery obligations serves the

public interest: Discovery provides the basic information which is necessary to expedite trials and plea decisions in an already overburdened court system and promotes fairness in the adversary system.").

Here, Simon was able to "examine" the radar gun manufacturer's manual, but was not allowed to make a copy of the manual with which to prepare his case. This substantially impaired Simon in the preparation of his defense, because, for all practical purposes, it required Simon and his counsel to either expend unreasonable time and expense reviewing the manual, presumably at a government office, and copying the manual, or parts of it, by hand, or to do a quicker but inexact review of the material in order to avoid squandering time and funds. To so burden the defense in preparation for trial, when such information was readily available and already in the hands of the prosecution, was patently unfair and unjust. A reasonably drawn court order setting forth conditions on the use of and dissemination of the information obtained from a copy by the defense would have removed the arbitrariness and bias inhering in the approach followed in the instant case.

C.

The traffic stop in this case cannot be justified by reasonable suspicion. The district court based its ruling on the officer's probable cause to stop the vehicle, not reasonable

suspicion. Assuming reasonable suspicion is appropriate to justify a stop, this court has held that “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant that intrusion.” State v. Estabillio, 121 Hawai‘i 261, 270, 218 P.3d 749, 759 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968) (emphasis added)). “The ultimate test in these situations must be whether from these facts, measured by an objective standard, a [person] of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate.” Id. (quoting State v. Barnes, 58 Haw. 333, 338, 568 P.2d 1207, 1211 (1977)) (brackets added) (emphasis in original). Because without the reading from the radar gun, the officer would not have had reasonable suspicion to stop Simon’s vehicle, Simon’s use of the manual to prepare his defense was particularly important.

The State argues in its Opposition to Defendant’s Motion to Suppress that the officer who conducted the traffic stop on June 27, 2009 observed the defendant “traveling at a high rate of speed” in addition to observing his speed via radar. However, the district court held an evidentiary hearing on the Motion to Suppress on July 2, 2010 and October 1, 2010, and at the evidentiary hearing in which he testified, the officer did

not indicate that he observed the defendant traveling at a high rate of speed when he was not using his radar gun.

In this case, according to the officer, it was nighttime, and the officer was observing vehicles on a state highway as they came over a hill. The officer described traffic as sparse. He was using a Stalker DSR radar in a zone where the speed limit was 35 miles per hour when he tracked Simon's vehicle traveling 59 miles per hour. As noted, the district court held that the defendant's speed of travel, as measured on the officer's radar device, established probable cause for the officer to effectuate the stop. However, based on the officer's testimony at trial, other than the radar gun reading, the officer had no "specific and articulable facts" that would have provided him with reasonable suspicion to stop Simon's vehicle. He does not state in his testimony, for example, how fast the vehicle appeared to be traveling in comparison to other vehicles on the road, or whether he would have suspected that Simon's vehicle was exceeding the speed limit regardless of the radar gun readings.

In fact, the officer was asked by defense counsel on cross-examination at trial, "[s]o would you have tracked every vehicle or just some vehicles depending upon the type of headlights they had?", to which the officer responded, "I track every vehicle." Defense counsel further asked:

Q. [] But in this case when you picked up [] Simon's vehicle nothing had specifically drew your attention to his vehicle; correct?

A. The distance he was, all I saw was headlights.
Q. Okay. And so the answer would be, yes, nothing in particular?
A. Nothing in particular.

(Emphases added.) The officer's reason for stopping the vehicle was the radar gun reading, as indicated in his trial testimony, and thus, setting those results aside, the officer has not otherwise established that he could reasonably have believed that "criminal activity was afoot," based on observing Simon's vehicle and "no [person] of reasonable caution would be warranted in believing" otherwise. See Estabillio, 121 Hawai'i at 270, 218 P.3d at 758 (citations omitted). Manifestly, the stop cannot be justified by reasonable suspicion. The absence of such suspicion underscores the fact that the radar gun manual, as relevant to the ultimate radar gun reading, was essential information for Simon reasonably to have available to him.

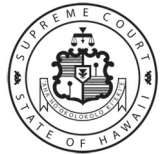
III.

The district court rendered its decision on its finding that there was a valid stop of Simon based on the radar gun reading. Obviously if the radar gun reading was incorrect or the reading was taken improperly, the officer would lack probable cause, and the basis for the stop would be invalid. The officer's testimony itself demonstrated that he had no reasonable suspicion for the stop. If the basis for the stop was invalid, all evidence thereafter, including that relating to Simon's OUVII

conviction, must be suppressed. The prosecution obviously had a copy of the materials and manuals bearing on the propriety of the radar gun use. Under such circumstances, to bar the defendant from obtaining a copy of the information that was easily available to the prosecution is unwarranted and places an inequitable burden on the defendant's constitutional right to prepare and present a defense. Application for the writ should be granted.

DATED: Honolulu, Hawai'i, February 28, 2013.

/s/ Simeon R. Acoba, Jr.



CONCURRING IN RESULT RECOMMENDED BY THE DISSENT, BY POLLACK, J.

I concur with the dissent's recommendation to accept the application for writ of certiorari.

DATED: Honolulu, Hawai'i, February 28, 2013.

/s/ Richard W. Pollack

