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SCWC-10-0000123

IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII,  
Respondent/Plaintiff-Appellee,

vs.

KAWA SALAS,  
Petitioner/Defendant-Appellant.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-10-0000123; CR. NO. 08-1-0443)

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I would hold that the indictment that charged Petitioner/Defendant-Appellant Kawa Salas (Salas) and co-defendant John Iopa (Iopa) with wielding a bat was not supported by probable cause inasmuch as the evidence before the grand jury demonstrated that a third party, and not Salas or Iopa, had carried the bat. Hence, the indictment must be dismissed without prejudice.

Assuming arguendo that this case should be remanded as decided by the majority,<sup>1</sup> the police lacked probable cause to arrest Salas. Salas was arrested apparently because he was "local." This was insufficient to provide probable cause for the arrest of a suspect, under article 1, section 7 of the Hawai'i Constitution<sup>2</sup> and constituted an unreasonable seizure. Because the pretrial identifications of Salas were a direct result of the arrest, those identifications must be suppressed.

Lastly, the court did not give a specific eyewitness identification instruction even though it recognized that eyewitness testimony was crucial to the case. On remand an eyewitness instruction must be given inasmuch as under the facts the jury would otherwise be without proper guidance to evaluate the testimony of Scott DeSa, (DeSa), Benjamin Mead, and Lucas Mead (collectively Complainants).

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<sup>1</sup> Assuming arguendo that remand is appropriate, I agree that the failure to give a unanimity instruction constituted plain error.

<sup>2</sup> Article 1, Section 7 of the Hawai'i Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

(Emphases added.)

I.

A.

This case arises from an altercation between Complainants and a second group of campers at a campsite on Kaloli Point on August 31, 2008. The second group included Salas and Iopa.

After Complainants had fallen asleep, they were awakened by members of the second group shouting "'get out of your [] tents' over and over again." When they exited their tents Complainants saw two males standing in front of their tents. The two men made threats and demands, such as "give us your [] money. You guys get [sic] drugs? I know you guys get drugs. I know you guys have money." At some point a third man also approached the tents of Complainants, holding "a wooden object [that] appeared to look like a bat." Later, a fourth male appeared and said "leave 'em alone," but the encounter continued.

Finally, DeSa heard one of the males say "[w]hat, you Hawaiian?" and he responded "[y]eah, I'm Hawaiian." The male then said "Well, your tent is ok, but I [sic] coming back for [the other] tent." The members of the second group then left.

Complainants called the police, who met them at DeSa's house ten minutes later. According to the police report, Complainants all gave different descriptions of the perpetrators. DeSa stated that there were "three males" that "appeared to be

local males, in their late teens to early 20s, about 5 feet 10 inches to six feet in height, about 180 pounds or so, with short dark hair."

Desa also stated that the individuals came from the second group's campsite. Lucas Mead related that there were "[a]t least five local male parties," but that he could not describe any of them. Benjamin Mead said that there were "approximately five males" and gave a description of two of them as "approximately 5 feet 8 inches, probably around 150 pounds, and local."<sup>3</sup> (Emphasis added.)

After taking their statements, the police escorted Complainants back to their campsite to retrieve their property. As Complainants were collecting their belongings, the police proceeded to the second campsite. The police "woke up everybody" at the second campsite and detained them, and eventually placed them in handcuffs. After Iopa was detained, he began talking loudly. DeSa recognized Iopa based on his voice and explained that he was able to "connect the voice clearly to the person who was . . . involved in the incident." Complainants then approached Sergeant Jurgen Canda (Sergeant Canda) and informed him that they recognized Iopa's voice and that they were positive that he had been making threats earlier.

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<sup>3</sup> Salas related that he was 5'7", weighed 150 pounds, and at the time of the incident he had long hair that was "hanging behind his shoulders."

Apparently, after Complainants identified Iopa, the police woke up Salas and asked him to exit his tent. Salas then left his tent and began to urinate against a tree. Subsequently, Salas was informed that he was under arrest, handcuffed, and seated next to Iopa near a white Nissan truck. The other males arrested at the campsite were not near Salas and Iopa.

After Salas was seated next to Iopa, DeSa approached Sergeant Canda and stated that he had recognized "the surf shorts that Salas was wearing while he was urinating."<sup>4</sup> Complainants subsequently approached Officer Ronald Paro (Officer Paro) and informed him that they could identify both Iopa and Salas.<sup>5</sup>

All of the males present were arrested except for Kameron Wilbourn (Wilbourn), because as a Caucasian male the police believed that he did not fit the description provided by Complainants. One officer explained that he "would [have] arrest[ed] everybody," but that Complainants specifically stated that "local males" were involved so he did not arrest Wilbourn.<sup>6</sup>

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<sup>4</sup> DeSa apparently did not remember the precise point when he identified Salas to the police officers.

<sup>5</sup> At a hearing regarding Salas' motion to suppress identification, Lucas Mead stated that he "was not sure" and "could not recollect" identifying Salas at the scene. Benjamin Mead stated that he identified Salas at the scene after the individuals who had been arrested were leaving the scene in a single-file line.

<sup>6</sup> Because the officers believed that Wilbourn did not match the given description, one officer asked DeSa and Lucas Mead if they remembered Wilbourn. DeSa and Mead responded that they did not.

The next morning, the police showed DeSa and the Mead brothers four sets of photographic lineups that included Salas and Iopa, and the other individuals arrested previously. DeSa was able to identify Iopa as one of the males standing outside his tent. Lucas Mead was able to identify Salas, but not Iopa. Benjamin Mead was unable to identify either Salas or Iopa.

B.

The case was brought before the grand jury on September 24, 2008. At the grand jury, DeSa related that at first there were two people, a male wearing a black shirt and a "shadowboxer." Later, however, "there was a third guy that came and he had a bat." The third male was "swinging the bat" and "giving [Complainants] the impression [that] . . . we have this bat here." In other words, DeSa explained that by swinging the bat, the third male indicated to Complainants that "they had a weapon." When asked how many people he identified, DeSa responded that he could identify two people, the male with the black shirt and the shadow boxer. DeSa did not identify the male with the bat.

Similarly, Benjamin Mead stated that he was able to identify the male wearing the black shirt and the shadowboxer, but that "we have an idea who the guy was holding the bat, but I couldn't really identify him rightly[.]" Finally, Officer Paro

testified that the two individuals identified by DeSa and Benjamin Mead were Iopa and Salas.

C.

Iopa and Salas were indicted by the grand jury on September 25, 2008. The indictment alleged as follows:

On or about the 1st day of September, 2008, in the County and State of Hawai'i, Kawa Salas and John K. Iopa, in the course of committing theft and/or non-consensual taking of a motor vehicle, was armed with a dangerous instrument, a bat, and threatened the imminent use of force against the person of [DeSa] and/or Benjamin Mead and/or Lucas Mead and/or Tina Mukai, who was present, with intent to compel acquiescence to the taking of or escaping with the property, thereby committing the offense of Robbery in the First Degree, in violation of Section 708-840(1)(b),<sup>[7]</sup> and/or 702-221(2)(c)<sup>[8]</sup> and/or 702-222(1),<sup>[9]</sup> Hawai'i Revised Statutes,

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<sup>7</sup> HRS § 708-840(1)(b) (Supp. 2009) provided in relevant part as follows:

**§ 708-840 Robbery in the first degree.**

(1) A person commits the offense of robbery in the first degree if, in the course of committing theft or non-consensual taking of a motor vehicle:

. . . .

(b) The person is armed with a dangerous instrument and:

- (i) The person uses force against the person of anyone present with intent to overcome that person's physical resistance or physical power of resistance; or
- (ii) The person threatens the imminent use of force against the person of anyone present with intent to compel acquiescence to the taking of or escaping with the property

(Emphasis added.)

<sup>8</sup> HRS § 702-221(2)(c) (1993) provides in relevant part as follows:

**§ 702-221 Liability for conduct of another**

(2) A person is legally accountable for the conduct of another person when:

. . . .

(continued...)

as amended.

(Emphasis added.)

D.

Prior to trial, Salas filed a combined "Motion to Suppress the Pre-Identification of Defendants" and a "Motion to Dismiss Indictment." Salas maintained, inter alia, that the identification procedures used by the police were impermissibly suggestive. The court denied Salas' motions on January 21, 2010.

E.

Trial began on July 13, 2010. In its opening statement, Respondent/Plaintiff-Appellee the State of Hawai'i (the State) indicated that Salas and Iopa had stood outside Complainants' tent and threatened them. The State further asserted that a third party held "a bat, a wooden object about

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<sup>8</sup>(...continued)

(c) He is an accomplice of such other person in the commission of the offense.

(Emphasis added.)

<sup>9</sup> HRS § 702-222(1) (1993) provides in relevant part as follows:

**§ 702-222 Liability for conduct of another; complicity.**

A person is an accomplice of another person in the commission of an offense if:

(1) With the intention of promoting or facilitating the commission of the offense, the person:

(a) Solicits the other person to commit it; or

(b) Aids or agrees or attempts to aid the other person in planning or committing it; or

(c) Having a legal duty to prevent the commission of the offense, fails to make reasonable effort so to do[.]

(Emphases added.)



two feet in length . . . in his hand waiving it back and forth as [Iopa] and [Salas] made verbal and physical threats." In his opening statement, Iopa similarly stated that Wilbourn was present at the robbery and was carrying the bat. Salas asserted that there were only two perpetrators, Wilbourn and Rylan Torres-Acia (Torres-Acia), and that Salas and Iopa had been erroneously identified.

At trial, the evidence connecting Salas to the incident was the eyewitness identification by DeSa and the Mead brothers. DeSa related that when Salas had been standing outside his tent, his hair was "pulled back," but that when he identified him at the scene, his hair was "out" and was "shaggy" or "fuller." On the other hand, members of the group camping with Salas testified that, prior to the incident, Salas had been drinking heavily and had vomited all over himself and had been carried to his tent, where he fell asleep. Those individuals testified that it had been Wilbourn and Torres-Acia, and not Iopa and Salas, who had threatened Complainants.

F.

Salas did not request a specific jury instruction on eyewitness identification. The court did not issue any specific jury instructions on eyewitness identification.<sup>10</sup>

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<sup>10</sup> The trial concluded on July 29, 2010, prior to this court's decision in State v. Cabagbag, 127 Hawai'i 302, 277 P.3d 1027 (2012) on May (continued...)

G.

On July 29, 2010, the jury found Salas guilty of second degree robbery. Salas was sentenced to a term of imprisonment of five years.

II.

Salas appealed to the Intermediate Court of Appeals (ICA) on November 3, 2010. At the ICA, Salas argued, inter alia, that the pre-trial identifications of Salas by DeSa and the Mead brothers should be suppressed because the police did not have probable cause to arrest Salas prior to his identification. The ICA concluded that "Salas did not raise this argument before the circuit court and therefore it was waived." State v. Salas, No. CAAP-10-0000123, 2013 WL 2421692, at \*1 n.5.

III.

In his Application to this court, Salas contented, inter alia, that the ICA erred in failing to hold that the failure to suppress the pre-trial identification of Salas constituted plain error. According to Salas, his arrest "was a race-based round up of all male locals at Kaloli Point," and "race alone provides an insufficient basis for the detention or arrest of a suspect." Further, in his Reply Salas argued for the first time that "no eyewitness instruction was requested or

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<sup>10</sup>(...continued)  
17, 2012.

given," and that "[i]n the present case, [an] eyewitness instruction was crucial as there was no physical evidence[.]"

IV.

A.

The indictment must be dismissed without prejudice because it was not supported by the evidence adduced at the grand jury. "In Hawai'i, constitutional due process requires a fair and impartial grand jury proceeding." State v. Chong, 86 Hawai'i 290, 293, 949 P.2d 130, 133 (1997). The grand jury must return an indictment only upon a finding of probable cause for the charge therein. State v. Ganai, 81 Hawai'i 358, 367, 917 P.2d 370, 379 (1996); State v. Ontai, 84 Hawai'i 64, 929 P.2d 69, 76 (1996).

In the instant case, Salas was accused of violating HRS § 708-840(1)(b). To establish guilt under HRS § 708-840(1)(b), the State was required to demonstrate that the accused was "armed with a dangerous instrument." HRS § 708-840(1)(b). Here, the charge stated that "[Salas] and [Iopa] . . . was [sic] armed with a dangerous instrument, a bat[.]" Thus, the charge alleged either that Salas was guilty of wielding the bat as a principal, or that Iopa had carried that bat and Salas was guilty as Iopa's accomplice.<sup>11</sup>

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<sup>11</sup> The charge stated that Salas violated HRS § 708-840(1)(b) and/or HRS § 702-221(2)(c) and/or HRS § 702-222(1). HRS §§ 702-221 and 702-222 are (continued...)

However, the evidence presented to the grand jury established that neither Iopa nor Salas held the bat during the alleged robbery and thus neither was "armed with a dangerous instrument" under HRS § 708-840(1)(b). Instead, both DeSa and Benjamin Mead testified that a third party, and not Salas or Iopa, held the bat. Therefore, there was neither probable cause to charge Salas of violating HRS § 708-804(1)(b) as a principal or to charge Salas as violating HRS § 708-804(1)(b) as Iopa's accomplice, because there was no evidence supporting the allegation that either Iopa or Salas was armed with a dangerous instrument. Hence, there was insufficient evidence adduced before the grand jury to support a finding of probable cause as to the charge alleged in the indictment. See Ontai, 84 Hawai'i at 64, 929 P.2d at 76.

A conviction at trial does not cure an illegitimate indictment, because if "a trial could validate an otherwise invalid indictment, the right to indictment by grand jury would become a nullity and the grand jury would cease to operate as a check upon the district attorney's power to initiate prosecution." Adams v. State, 598 P.2d 503, 510 (Alaska 1979) (internal citations omitted). Consequently, the indictment must be dismissed. However, such dismissal may be without prejudice

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<sup>11</sup>(...continued)  
the Hawai'i Penal Code provisions relating to accomplice liability.

inasmuch as the State may file an indictment that correctly reflects any grand jury proceeding.

B.

Salas did not raise the argument that the indictment was not supported by probable cause in his Application. However, this court has explained that it "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Miller, 122 Hawai'i 92, 101, 223 P.3d 157, 166 (2010). The right to a grand jury indictment is guaranteed in article 1, section 10 of the Hawai'i Constitution.<sup>12</sup> To reiterate, the grand jury performs the function entrusted to it by the constitution by returning an indictment only on the basis of probable cause. See Ganai, 81 Hawai'i at 367, 917 P.2d at 379. Here, inasmuch as the indictment was not supported by probable cause, Salas' fundamental constitutional right to a fair and impartial grand

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<sup>12</sup> Article 1, section 10 of the Hawai'i Constitution provides in relevant part as follows:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide . . . .

(Emphasis added.)

jury proceeding was violated. Hence, it is appropriate to notice plain error for violation of Salas' constitutional right.

V.

A.

Assuming arguendo remand as ordered by the majority, the police lacked probable cause to arrest Salas prior to the on-scene identification of him insofar as the police arrested all "local" males at the scene prior to Complainants' identification. "Probable cause exists when the facts and circumstances known to the officer . . . would warrant a man of reasonable caution to believe that the person arrested has committed or is committing an offense." State v. Barnes, 58 Haw. 333, 335, 568 P.2d 1207, 1210 (1977). It has been explained that "descriptions equally applicable to large numbers of people will not support a finding of probable cause[.]" Commonwealth v. Jackson, 331 A.2d 189, 191 (Pa. 1975).

Thus, in a case where the police had "no better description" of an assailant than "that he was an [African-American] youth," and the police proceeded to arrest at least 24 young African-American men, it was conceded that probable cause to arrest was lacking. Davis v. Mississippi, 394 U.S. 721, 725 (1969). Analogously, it has been explained that "race, as a single criteria, provides an insufficient basis for the detention or arrest of a suspect." Coleman v. State, 562 A.2d 1171, 1175

(Del. 1989); see also Washington v. Lambert, 98 F.3d 1181, 1191 (9th Cir. 1996).

The testimony of the officers and the police report demonstrates that the officers determined who to arrest based on who was "local." One officer explained that Wilbourn was not arrested solely because he was Caucasian, the description being given by Complainants stating that the perpetrators were "local males." Thus, the police declined to arrest any Caucasian males because such males did not fit the description available to them, but nevertheless arrested all of the non-Caucasian males at the campsite even if they also did not fit the description provided by Complainants. In other words, the singular factor that the police considered when determining whether a male at the campsite was to be detained and arrested before any identification took place was the generic description of "local."

It has been explained that "the potential attributes of [an] arrest clearly include such circumstances as handcuffing, leading the detainee to a different location, subjecting him or her to booking procedures, ordering his or her compliance with an officer's directives, using force, or displaying a show of authority beyond that inherent in the mere presence of a police officer . . . such that an innocent person could reasonably have believed that he or she was not free to go and that he or she was being taken into custody indefinitely[.]" State v. Ketchum, 97

Hawai'i 107, 125, 34 P.3d 1006, 1024 (2001) (internal brackets and question marks omitted) (emphases added). Thus, this court has concluded that an arrest occurs when a police officer ordered a suspect to leave a toilet stall, stand against a wall, and remain subject to the officer's directions. State v. Delmondo, 54 Haw. 522, 554, 512 P.2d 551, 556 (1973); cf. Ketchum, 97 Hawai'i at 131, 34 P.3d at 1030 (Acoba, J., dissenting) (explaining that a suspect was handcuffed, "obviously deprived of his freedom in a significant way," and therefore "plainly in custody").

It would appear apparent that Salas was directed to leave his tent, and because the police were arresting all locals, the police informed him he was under arrest, handcuffed him, and directed him to sit next to Salas. Hence, it is plain that once Salas was directed to leave his tent he was being "taken into custody indefinitely" and thus was under arrest. Ketchum, 97 Hawai'i at 125, 34 P.3d at 1025. Complainants only viewed Salas at the campsite after the police woke Salas and directed him to exit his tent. DeSa informed the police that he could identify Salas after Salas had been informed he was under arrest and handcuffed. Thus, had the police not directed Salas out of his tent in order to place him under arrest,<sup>13</sup> Complainants would not

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<sup>13</sup> Inasmuch as the police informed Salas that he was being placed under arrest immediately after he exited his tent and urinated on a tree, it is plain that the police directed Salas to leave his tent for the purposes of placing him under arrest.



have had an opportunity to identify him. The on-scene identification by Complainants consequently was a "direct result of the illegal arrest[.]" Garner v. State, 314 A.2d 908, 912 (Del. 1973).

Similarly, the police only included the photographs of those "in custody" in the photographic lineup shown to Complainants the morning after the incident. If Salas had not been arrested, he would not have been "in custody" and thus his picture would not have been included in the photographic lineup. Lucas Mead's resulting identification of Salas, therefore, was also the "direct result of the illegal arrest[.]" Garner, 314 A.2d at 912.

B.

The generic description of "locals," permitting the arrest of all non-Caucasian males at the campsite, was insufficient to provide the officers with probable cause to arrest Salas. See Davis, 394 U.S. at 725; see also Jackson, 331 A.2d at 191. Because the police lacked probable cause to arrest Salas, the pre-trial identifications<sup>14</sup> were the "fruit of the poisonous tree," and therefore must be suppressed. State v. Edwards, 96 Hawai'i 224, 241, 30 P.3d 238, 255 (2001) (holding that "the 'fruit of the poisonous tree' doctrine prohibits the

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<sup>14</sup> Salas does not challenge the identifications of Salas by DeSa and the Mead brothers made at trial but would be able to do so on remand.

use at trial of evidence that comes to light as a result of the exploitation of a previous illegal act of the police" (internal brackets and quotation marks omitted)). An identification is a fruit of the poisonous tree and subject to suppression if it is the "direct result of the illegal arrest." Garner, 314 A.2d at 912; accord Wayne R. LaFave, Criminal Procedure § 9.4(d).

However, any subsequent identifications of Salas by Complainants at trial are not necessarily invalid. For example "[i]f a pretrial photographic identification procedure was impermissibly suggestive, then the crucial question is whether such identification procedure gave rise to a very substantial likelihood of irreparable misidentification, i.e., whether under the totality of the circumstances the eyewitness identification was reliable despite the suggestiveness of the pretrial identification procedure." State v. Malani, 59 Haw. 167, 170, 578 P.2d 236, 238 (1978). Accordingly, the trial identification of Salas may be challenged on remand by an appropriate motion to suppress.

C.

The argument that the police did not have probable cause to arrest him was not raised in Salas' motions with respect to identification, although the essential facts of his arrest were presented in the motions. The use of the pretrial identifications of Salas by Complainants was the fruit of his

illegal arrest and thus infringed on the constitutional protections against arrests without probable cause. Under the circumstances, it is therefore appropriate to notice plain error on this ground. See discussion supra.

VI.

Finally, assuming arguendo remand is appropriate, the court should have given the jury a specific instruction to aid the jury in adequately evaluating the eyewitness identification of Salas by Complainants. Misidentification is the “the single greatest cause of wrongful convictions in this country.” Cabagbag, 127 Hawai‘i at 313, 277 P.3d at 1038 (Part I by Acoba, J.) (quoting Perry v. New Hampshire, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting)). In the absence of “appropriate instructions from the court, the jury may be left without sufficient guidance on how to assess critical testimony, sometimes the only testimony, that ties a defendant to an offense.” Id. at 313, 277 P.3d at 1038. This case was tried prior to May 17, 2012, when the majority of this court in Cabagbag decided that the duty to instruct on eyewitness identification should apply only prospectively. Because this case if remanded, would be remanded on other grounds the court must give a specific eyewitness identification instruction on remand.

Here, as the State acknowledged at oral argument, the evidence linking Salas to the crime was eyewitness identification. However, at trial, several other members of Salas' group corroborated his testimony that he had been asleep at the time of the incident. Additionally, they identified the perpetrators not as Salas and Iopa, but instead as Wilbourn and Torres-Acia. In light of the widely recognized necessity of giving specific instructions to guide juries in weighing eyewitness testimony, see Perry, 132 S.Ct. at 728-29 (majority opinion), the failure to give a specific eyewitness instruction on remand would constitute reversible error.

VII.

Based on the foregoing, I respectfully concur in part and dissent in part.

DATED: Honolulu, Hawaii, February 12, 2014.

/s/ Simeon R. Acoba, Jr.

