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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII,
Respondent/Plaintiff-Appellee,

vs.

ROBERT TETU,
Petitioner/Defendant-Appellant.

SCWC-13-0003062

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0003062; CR. NO. 10-1-0833)

DECEMBER 5, 2016

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

I. Introduction

The due process clause of the Hawai'i Constitution provides a criminal defendant with the right to access the crime scene to prepare for trial. However, I respectfully dissent from

the Majority's conclusion that a defendant is entitled to access a crime scene that is located on private property, without any showing of need. In my view, a defendant should be required to demonstrate why inspection of the scene will lead to relevant evidence on a material issue. This is not a difficult burden, and in most cases a defendant's request for access to the scene should be granted. In contrast, the Majority's approach--which recognizes an absolute right of access, subject only to "time, place, and manner" restrictions--does not adequately protect the privacy of victims or other third parties. Specifically, in some cases, a defendant's request to access the crime scene may lack a valid evidentiary purpose. Moreover, it may cause additional trauma for victims who could be compelled to allow defendants access to their home, if it was the scene of the crime.

In the instant case, Tetu made a sufficient showing and thus, the circuit court should have granted him access. However, the circuit court's error in denying Tetu access to the crime scene was harmless beyond a reasonable doubt. Thus, I concur in the result reached by the Majority.

II. Discussion

The due process clause of the Hawai'i Constitution provides a criminal defendant with the right to access the crime scene. Such access ensures that the defendant has an opportunity

to be heard in his or her defense, which is a "basic ingredient[] of due process of law." Washington v. Texas, 388 U.S. 14, 18 (1967).

However, I respectfully disagree with the Majority's conclusion that a defendant is entitled to access the crime scene without any showing of need. The situations in which these requests will arise--involving access to private property which is no longer in police control--implicate significant privacy concerns. See In Interest of A.B., 99 A.3d 782, 793 (N.J. 2014) (in a case involving an alleged sexual assault on a six-year old girl in her home, court notes that "[t]he right to privacy in one's home is a basic right, and all alleged victims of crime have an interest in not revisiting a traumatic event."). These concerns are not alleviated by the Majority's "time, place, and manner" restrictions.

Indeed, article I, section 6 of the Hawai'i Constitution specifically states that, "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." In recommending adoption of article I, section 6 of the Hawai'i Constitution, the drafters of this provision stated that "[p]erhaps the most important aspect of privacy is that it confers upon people the most important right of all--the right to be left alone." Stand.

Comm. Rep. No. 69 in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 674 (1980). Further, the drafters asserted that the right to privacy gives each individual "the right to control highly personal and intimate affairs of his own life." Id.¹

Rather, I would require the defendant to make a threshold showing that the inspection of the crime scene would lead to relevant evidence on a material issue. This requirement is not novel or groundbreaking. Nearly every jurisdiction to address this issue requires some type of threshold showing by the defendant. See, e.g., A.B., 99 A.3d at 793 ("The burden rests with the defendant to show a reasonable basis to believe the inspection will lead to relevant evidence on a material issue."); State v. Muscari, 807 A.2d 407, 417 (Vt. 2002) (requiring "some showing that the requested intrusion is relevant and material"); Henshaw v. Commonwealth, 451 S.E.2d 415, 420 (Va. Ct. App. 1994) (requiring a "prima facie showing of relevance"); People v. Nicholas, 599 N.Y.S.2d 779, 783 (N.Y. Sup. Ct. 1993) (requiring a "prima facie showing . . . [of] relevant [and necessary] material

¹ While the drafters acknowledged that at times, the interest of law enforcement will be strong enough to override the right to privacy, they asserted their intent to "grant the individual full control over his life, absent the showing of a compelling state interest to protect his security and that of others." Stand. Comm. Rep. No. 69 in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 675 (1980).

evidence . . . not already provided"); Bullen v. Superior Ct., 251 Cal. Rptr. 32, 34 (Cal. Ct. App. 1988) (requiring sufficient "plausible justification" and "good cause" for the intrusion).

The Majority acknowledges these cases, but instead would grant all requests for access, and then have trial courts apply "time, place, and manner" restrictions. I respectfully believe that the Majority's approach will not provide sufficient protection for the interests of victims and private citizens who, through no choice of their own, find that their home or other property has become a crime scene. Further, trial courts should be empowered to deny requests for access that do not appear to have a legitimate purpose. See A.B., 99 A.3d at 793 ("Any discovery request that has as its objective causing intimidation, harassment, or abuse of an alleged victim is wholly illegitimate and must be denied.").

To be clear, most requests for access will be legitimate, and in the vast majority of cases, a defendant should easily be able to show why inspection of a crime scene will lead to relevant evidence on a material issue. However, in some cases, a defendant's request may not have a valid evidentiary purpose and may have the potential to cause additional trauma for victims. See A.B., 99 A.3d at 794 (stating that in a sexual assault case, the complaining witness's family desired to "not to

suffer the traumatizing effect of the [defendant's] presence in their in their home").²

In my view, Tetu has made a threshold showing that an inspection of the crime scene would lead to relevant evidence on a material issue. Therefore, I agree with the Majority that Tetu had a right to access to the crime scene. The instant case involved an alleged burglary where the physical conditions of the premises were relevant to whether Tetu intentionally entered a building, a required element of both first and second degree burglary. Since the fire-exit door was "exit-only" and had no signs of forced entry, inspection of the crime scene would have provided Tetu with evidence to support his theory that Itada led him to Maunaihi Terrace and held the fire-exit door open for him,

² In In Interest of E.G., 371 P.3d 693 (Colo. App. 2015), the defendant was convicted of two counts of sexual assault on a child. Id. at 695. On appeal to the Colorado Court of Appeals, the defendant asserted that the trial court erred when it denied his motion requesting court-ordered access to the crime scene in the basement of his grandmother's home. Id. The Colorado Court of Appeals required the defendant to "demonstrate that the evidence desired [was] relevant, material, and necessary to his defense." Id. at 697. The Colorado Court of Appeals, while noting that a defendant has a due process right to access a crime scene, concluded that the defendant's request was properly denied. Id. Significantly, the defendant provided no evidentiary purpose as to why he needed access, did not explain why access was relevant to his trial strategy, and did not state how accessing the crime scene would produce material and relevant evidence not otherwise provided to him through discovery. Id. at 698.

On appeal to the Colorado Supreme Court, the court rejected the Court of Appeals' holding that there was a due process right of access. See E.G., 368 P.3d 946, 954 (2016). Thus, it held that "neither a criminal defendant, nor anyone else, including the prosecuting attorney, has a constitutional right to force a third party to open her private home for investigation," but affirmed the Court of Appeals and trial court's result. Id.

and that he entered the building to retrieve her clothing, not to take anything that did not belong to him.

Additionally, Tetu noted in his motion to compel discovery that the photographs that police provided him omitted relevant parts of the property, including one of the utility closets. Tetu's counsel argued that the State's photographs, diagrams, and video surveillance did not adequately orient him to the area in question. Tetu's counsel desired access to the crime scene to measure distances between objects and acclimate himself to the crime scene to be able to cross-examine witnesses and understand Tetu's account of events. A visit to the crime scene would have helped Tetu's counsel acquire a more complete understanding of Tetu's account of events, document and photograph relevant parts of the crime scene, and develop Tetu's possible defenses. At trial, as the Majority notes, Tetu's counsel was confused as to the position of the closets when cross-examining the condominium manager, which demonstrates why access to the crime scene was justified in this case. See Majority Opinion at 25. Thus, allowing Tetu to inspect the crime scene would have given him access to materials necessary to building an effective defense.³

³ I also agree with the Majority that despite the circuit court's error in denying Tetu access to the crime scene, there was overwhelming
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The Majority acknowledges "rare cases" in which its "time, place, and manner restrictions" will not be sufficient. See Majority Opinion at 37-38. However, the Majority does not offer any further explanation, leaving trial courts without guidance on how to identify those cases. Therefore, I respectfully disagree with the Majority and would require the defendant to demonstrate that access to the crime scene will lead to relevant evidence on a material issue.

III. Conclusion

I dissent from the Majority's holding that a defendant's access to the crime scene is absolute and subject only to "time, place, and manner" restrictions. Rather, I would require the defendant to make a threshold showing that the inspection of the crime scene would lead to relevant evidence on a material issue--a standard adopted by nearly every other state to have considered this issue. Requiring that showing is particularly appropriate in Hawai'i, since our Constitution specifically protects an individual's privacy. Respectfully, the

³(...continued)

evidence of Tetu's guilt. Notably, at trial Tetu admitted to his conduct on the video surveillance footage. The resident manager also recounted the footage and testified that it showed Tetu breaking in to the utility closets with a tool, wiping the door handles exiting the closets, and leaving with a "bag of stuff" and "a flashlight in his mouth." I agree with the Majority that there is no reasonable possibility that the circuit court's error in denying Tetu's access to the crime scene contributed to his conviction. Thus, I agree that the error was harmless beyond a reasonable doubt.

Majority's approach does not sufficiently protect a victim's privacy rights.

However, since I agree with the Majority that Tetu's conviction should be affirmed, I concur in the result.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

