

DISSENTING OPINION BY NAKAMURA, C.J.

I respectfully dissent. In my view, Defendant-Appellant GJ Williander (Williander) provided valid grounds for a continuance to enable him to present the testimony of Officer Sunada. I therefore believe that the Circuit Court abused its discretion in denying Williander's request for a continuance.

The only testimony offered by the State to show that Williander was guilty of robbery, as opposed to assault, was the testimony of Ragudo. Ragudo testified that from across a six-lane boulevard, he heard Williander yell, "Give me your wallet. Give me your fucking wallet," and then saw Williander punch a man (Aihara) that Williander was holding down. Aihara, the alleged victim, testified that he heard a voice, but he "was kind of in shock" and could not "make out what was said." Aihara had no recollection of anyone demanding his wallet before he was assaulted; he never felt anyone reach into his pocket to try and take his wallet; he had no recollection of anyone touching his pants anywhere; and he still had his wallet after the assault.

Williander testified that he consumed prodigious amounts of alcohol on the night in question and had no recollection of the charged incident. Officer Sunada's police report stated that when Williander was arrested (a short time after the incident), Williander smelled of alcohol and "was slurring his words and rambling unintelligible verbiage." It appears that Officer Sunada's observations, as reflected in his police report, provided the best and perhaps the only means for Williander to meaningfully challenge and cast doubt on Ragudo's testimony that he heard Williander make a demand for Aihara's wallet.

Under the circumstances presented, I believe that Williander satisfied factors (2) and (4) of the State v. Lee test for obtaining a continuance based on the unavailability of a witness by showing: (factor 2) "that substantial favorable evidence would be tendered by the witness"; and (factor 4) "that the denial of the continuance would materially prejudice the defendant." State v. Lee, 9 Haw. App. 600, 604, 856 P.2d 1279,

1282 (1993) (block quote format and citation omitted). I also agree with the majority that Willliander satisfied factors (1) and (3) of the Lee test. Accordingly, I conclude that the Circuit Court abused its discretion in denying Willliander's request for a continuance.

*Craig H. Nakamura*