IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

DAVIS YEN HOY CHANG,
Petitioner/Defendant-Appellant.

SCWC-17-0000674

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000674; CASE NO. 1DTA-16-04150)

JUNE 28, 2019

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

I respectfully dissent from the Majority's opinion, which will prohibit the consolidation of hearings on motions to suppress with trials when both parties consent on the record.

This court first determined in State v. Doyle, 64 Haw.

229, 638 P.2d 332 (1981), and later recognized in State v. Thomas, 72 Haw. 48, 805 P.2d 1212 (1991), that consolidation of a hearing on a motion to suppress with a trial was permissible when both parties agreed on the record to such a consolidation.[1] Doyle was decided in 1981. Thus, such consolidations have been authorized in Hawaiʻi courts for nearly forty years.

The Majority overrules this court's precedent in Doyle and Thomas sua sponte. Neither party in this case at any time suggested that the trial court's consolidation of the suppression hearing and trial was improper or contrary to Hawaiʻi Rules of Penal Procedure (HRPP) Rule 12(e). Rather, both parties expressly agreed to consolidate Chang's hearing on his motion to suppress with his bench trial. As Chang's attorney explained, the parties were "consolidating everything so [that they wouldn't] have to have multiple hearings [on] multiple dates."

As the Majority acknowledges, the commentary to HRPP Rule 12(e) indicates that the provision's intent is to protect the State's statutory right, prior to trial, to appeal an adverse

[1] Doyle's holding was based, in part, on State v. Texeira, 62 Haw. 44, 46, 609 P.2d 131, 134 (1980), a case wherein this court recognized, but did not explicitly hold, that parties could stipulate to consolidate hearings on motions to suppress with trials.

ruling on a suppression motion.[2] See Majority at 9-10; Comm. For Penal Rules Revision of the Judicial Council of Haw., Proposed Hawaiʻi Rules of Penal Procedure at 80 (June 1975); Doyle, 64 Haw. at 231 n.2, 638 P.2d at 334 n.2. Given this purpose, it would appear that the State should have the ability to waive that protection if it chooses to do so, as long as it is willing to accept the possibility that its appeal rights could be lost if the defendant is ultimately acquitted. Parties often must make strategic decisions about whether and when to file appeals and I respectfully disagree with the Majority's suggestion that allowing the prosecution to do so in this context would denigrate the judicial process or improperly delegate the court's authority. See Majority at 29 n.20.

The Majority also identifies a number of potential consequences for a defendant who agrees to consolidate, including the defendant's hampered ability to obtain a deferred acceptance of a guilty or no contest plea, enter a conditional plea, or know the evidence against him or her prior to trial. See Majority at 25-28. Again, I fail to see why defendants should not be able to choose to forgo those possible benefits, and to instead have the

[2] To support its position, the Majority cites to cases from other jurisdictions, which interpret their court rules to require the determination of suppression motions prior to trial. See Majority at 14-17. Notably, none of these cases address the main issue here, which is whether the parties should be able to waive such a requirement upon stipulation.

case resolved at one time, rather than in multiple proceedings.

To be sure, defendants should be advised of their rights with respect to a consolidated hearing and trial. Thus, I would hold that where the consolidation of a pre-trial suppression hearing and trial is proposed, the trial court should give a modified Lewis advisement prior to seeking confirmation that the defendant consents to consolidation.[3] Providing the advisement at that time would ensure that the defendant understood the ramifications of providing such consent.

Specifically, the advisement would need to make clear that: (1) the defendant has the right to testify and the right not to testify pertaining to the suppression hearing, as well as to trial; (2) the defendant's decision to testify or to remain silent with regard to the motion is independent of the defendant's decision to testify or to remain silent at trial; and (3) the defendant's suppression hearing testimony may not be used as evidence at trial without the defendant's consent.

I emphasize, again, that the ability of the district court to consolidate the proceedings was not raised, briefed, or argued by the parties before this court. This court should not

[3] Alternatively, the trial court could decline to consolidate the two proceedings. In that event, once the suppression hearing is complete, the parties could stipulate to admit some or all of the hearing testimony as evidence at trial.

change such a well-settled procedure on our accord without being fully informed by those who will be directly affected by that change. Rather than acting sua sponte, I believe a better approach would be to present the issue to the penal rules committee, for consideration of possible amendments to HRPP Rule 12. Under that approach, all interested parties, including the bar and public, could provide their input.

Accordingly, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama