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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

JOSHUA LEE,
Petitioner/Defendant-Appellee.

SCWC-16-0000797

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000797; CR. NO. 1PC151001959)

FEBRUARY 9, 2021

DISSENTING OPINION BY WILSON J.

The Majority creates a new suicide exception to the constitutional right to privacy in a home or bedroom. All people of the State of Hawai'i ("the State") are now at risk of unconsented, warrantless entry into their homes or bedrooms by police who have been told that the person residing in the home or the bedroom might be suicidal. The decision of the Majority significantly reduces the protection afforded to Hawai'i's law-abiding citizens by the constitutions of the State of Hawai'i and

the United States to be free from unconsented invasion of the home and bedroom by government agents.

Mr. Lee had committed no crime at the time his bedroom was entered against his will. Nor was he under investigation for criminal activity. A member of his family, concerned that he was suicidal, called the police to obtain the State's assistance to investigate. In his room with the door locked, Mr. Lee was asked by the police standing on the other side of the door whether he was in need of assistance. His response was unequivocal: he did not want the police to enter his room; he was "fine." He told the police to "go away." Mr. Lee's clear denial of the police's entry into his room was an assertion of his right to privacy; his right to be free from unreasonable search and seizure; and his right to be free from government invasion of the room where he alone conducted his personal, private affairs. See, e.g., State v. Lopez, 78 Hawai'i 433, 441, 896 P.2d 889, 897 (1995) ("The right of the people to be free from unreasonable searches and seizures is firmly embedded in both the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution."); State v. Curtis, 139 Hawai'i 486, 497, 394 P.3d 716, 727 (2017) (noting that this court has "often recognized broader protections '[i]n the area of searches and seizures under article I, section 7' than our federal counterparts. . . . This is because article I,

section 7 is 'enforceable by a rule of reason which requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary.'" (citations omitted)). The rights asserted by Mr. Lee are all constitutional rights that heretofore protected the privacy of citizens in their bedrooms and homes. See, e.g., State v. Iona, 144 Hawai'i 412, 416, 443 P.3d 104, 108 (2019) ("Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution 'safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" (citations omitted)); State v. Navas, 81 Hawai'i 113, 122, 913 P.2d 39, 48 (1996), as amended (Mar. 19, 1996) ("Article I, section 7 of the Hawaii Constitution[, which expressly guarantees the right to privacy,] protects people from unreasonable government intrusions into their legitimate expectations of privacy." (citations omitted)). Moreover, Hawai'i provides greater protection of the right to privacy under the Hawai'i Constitution than is afforded under the United States Constitution. See Lopez, 78 Hawai'i at 446, 896 P.2d at 902 (holding that unlike the "federal rationale" that the "primary purpose of the exclusionary rule on the federal level is to deter illegal police conduct," under the Hawai'i Constitution "an

equally valuable purpose of the exclusionary rule under article I, section 7, is to protect the privacy rights of our citizens").

Suicide is understandably a matter of great concern to a person's family and friends, and the broader community. However, privacy in the home—particularly privacy in the bedroom—remain the protected province of the citizen who declares to the police that the concerns of loved ones and friends are unfounded.¹ A citizen reposing in the privacy of a bedroom who the police have probable cause to believe has committed a crime—unlike Mr. Lee who the police did not have probable cause to believe committed a crime—is protected by the constitutions of the State of Hawai'i and the United States from unconsented, warrantless invasion of the privacy of the bedroom. Mr. Lee, who was by all accounts a law-abiding citizen before the police entered his bedroom, was entitled to no less protection from intrusion into his bedroom once he declared unequivocally that he was not in need of assistance.

The exclusionary rule's purpose of deterring police misconduct is of particular relevance to the police's treatment

¹ The license granted by the Majority to surrender another's right to privacy in the bedroom or home is not limited to family or friends. Presumably any person who wishes the police to enter a home or bedroom to investigate whether the occupant is considering suicide may employ the Majority's new suicide exception to the right to privacy. Those with illegitimate intent to cause police intrusion into another's home or bedroom using the suicide exception as a ruse are thus empowered.

of Mr. Lee. In the course of asserting his right to be free from illegal invasion of his privacy, Mr. Lee was ridiculed by the representatives of the State who thereafter forced entry into his room. After he told the police he was "fine," asked the police to "go away," and asked if they had a warrant, the police responded, "[w]e don't need a warrant, dumb ass." Notwithstanding his suspected vulnerable suicidal condition, the police told Mr. Lee that he "needed to grow up[,] "be a man[,] "and "stop being a baby[.]"

The Majority concedes that one of the purposes of the exclusionary rule is to deter the circumvention of the Hawai'i Constitution's protections. See Lopez, 78 Hawai'i at 446, 896 P.2d at 902. However, the Majority endorses the conduct of the police: "Despite Lee's requests that the officers leave, the officers were required to ensure that Lee was neither harmed nor at imminent risk of injuring himself." Majority at 4. Respectfully, the Majority's assertion that the police were "required" to take action against Mr. Lee's will after he made clear from behind his locked door that he was not in need of police assistance, and after he asked the police to leave him alone, is unsupported by authority and contravenes the right to privacy oft acknowledged by this court. See, e.g., Lopez, 78 Hawai'i at 446, 896 P.2d at 902 ("Although we acknowledge that the Hawai'i exclusionary rule serves the valuable purpose of

detering governmental officials from circumventing the protections afforded by the Hawai'i Constitution . . . we now pronounce that an equally valuable purpose of the exclusionary rule under article I, section 7, is to protect the privacy rights of our citizens."); State v. Clark, 65 Haw. 488, 493, 654 P.2d 355, 359 (1982) ("The 'Fourth Amendment . . . protects people from unreasonable government intrusions into their legitimate expectations of privacy[,]' . . . and such description well illustrates that there is no expectation of privacy of greater legitimacy than that which we have in our 'private parts.'" (internal citations omitted)). Notably, Mr. Lee's brother also testified that after he saw that Mr. Lee was unharmed, he asked the police to leave. Specifically, he testified that he said to the police, "We see Josh is okay. That was our goal. Can you guys please leave?"

Thus, the police had no justification to pursue the unconsented entry of Mr. Lee's bedroom. Mr. Lee's brother's entreaty to the police is unrefuted evidence that Mr. Lee was no longer in need of assistance and any authority granted to police to be in the home was withdrawn. Having been told to leave Mr. Lee's bedroom, the police also received confirmation that he "was fine"; when the door was opened they witnessed that he was not harmed or at imminent risk of harm. The record contains no support for the proposition that the officers were required to

continue their apparent strategy to enter Mr. Lee's bedroom and confront him.

The Majority asserts that Mr. Lee's brother's withdrawal of his consent for the officers to be in the home "was legally irrelevant because Lee had already committed an intervening act."² Majority at 17 n.11. In particular, the

² The Majority endorses the approach taken by sister courts that "defendants' subsequent criminal acts, committed of their own free will, sever the causal link between the illegal entry and the evidence. See, e.g., State v. Saavedra, 396 N.W.2d 304, 305 (N.D. 1986); State v. Bale, 267 N.W.2d 730, 732-33 (Minn. 1978); People v. Townes, 359 N.E.2d 402, 406 (N.Y. 1976)." Majority at 15-16. When explaining the test, the Majority cites the Minnesota Supreme Court, which "posited that '[n]umerous factors bear on the application of this test, including the temporal proximity of the illegality and the fruit of that illegality, the presence of intervening circumstances, and the purpose and flagrancy of the physical misconduct.' . . . [T]he 'last factor is especially important, because the aim of the exclusionary rule is to deter police misconduct by removing the incentive to disregard constitutional guarantees.'" Majority at 16 (quoting Bale, 267 N.W.2d at 733) (emphases added). However, the Majority's opinion ignores relevant factors such as the temporal proximity and the flagrancy of the misconduct factors. Respectfully, by doing so, the Majority contravenes the purpose of the test, which is intended to be more protective of constitutional rights in the face of illegal police conduct.

As the Minnesota Supreme Court indicated in its opinion, the test is fact specific. Id. at 733 ("Under the peculiar facts and circumstances of this case, the causal chain between the initial arrest and the physical evidence seized appears so attenuated that it would not serve the purpose of the exclusionary rule to exclude the evidence were we to decide that issue in defendant's favor." (emphasis added)). The facts of this case indicate that the causal link was not severed. For the temporal proximity factor, the record repeatedly reflects, based on the testimony of multiple witnesses, that the events that occurred after the door was opened happened very quickly. Witness testimony demonstrates that there was confusion about what actually occurred first because of how quickly events unfolded. Sergeant Cobb acknowledged how quickly the events occurred when he stated that "it happened all at the same time." Thus, very little time passed between the police's illegal entry into Mr. Lee's bedroom and the resulting evidence. The other relevant factor posited by the Minnesota Supreme Court is the "flagrancy of the physical misconduct." Here, the flagrancy is apparent. Mr. Lee's brother testified that after he asked the police to leave, the police said, "Why did you call us then?" indicating that the officers believed they had free reign to engage in activity, regardless of its illegality, once they were called to assist. Most significantly, Sergeant Cobb's behavior was flagrant by goading Mr. Lee into opening the door as well
(continued . . .)

Majority points to two alleged "intervening acts": "First, after speaking with the officers through his bedroom door for approximately 20 minutes, Lee opened his bedroom door while holding a wooden sword in a threatening manner. Second, once the officers entered the room, Lee attempted to strike Sergeant Cobb with the sword." Majority at 17. Respectfully, the Majority ignores evidence in the record that the first alleged "intervening act" was not actually an intervening act because Mr. Lee was not holding the wooden sword in a threatening manner. According to Mr. Lee's brother, Mr. Lee was holding the stick with his arm straight down, the tip was facing the floor, and he never observed Mr. Lee swing the sword at anyone. The Majority contends that "Lee's brother did not testify that he could see into the room from where he sat [in the dining room]" and "that he only saw Lee after the officers had entered Lee's room." Majority at 17 n.11 (emphasis in original). However, the circuit court did not find that Mr. Lee was holding the wooden sword in a threatening manner. In fact, the circuit court found that "[w]hen Officer Kahao observed that the sword

(continued . . .)

as trying to pick open a locked bedroom door that he was already denied entry to. Consequently, when considering the temporal factor and the flagrancy of the illegal police behavior, even under the test posited by the Majority, the causal chain between the police's illegal entry and the physical evidence is not "so attenuated" nor were there any intervening acts that "sever the causal link between the illegal entry and the evidence."

Defendant was holding was a wooden sword, she took her hand off her firearm." This occurred prior to the officers illegally entering Mr. Lee's bedroom. Thus, Officer Kahao's actions in taking her hand off her weapon demonstrate that the officers did not feel threatened. The circuit court also found in Finding of Fact No. 21 that "[t]he officers observed that Defendant was holding a wooden sword, not a real samurai sword, before they entered Defendant's bedroom[,]" which indicates that the officers did not feel threatened given that the officers entered Mr. Lee's room after seeing the wooden sword was not a real samurai sword. These circuit court findings are uncontested, and the evidence does not support a holding by this court that the findings are clearly erroneous.³ Thus, the Majority is mistaken in asserting that Mr. Lee had already committed an intervening act prior to Mr. Lee's brother's withdrawal of consent.⁴ Mr. Lee was not engaging in an illegal act by standing in his bedroom with a stick in his hand by his side.

³ "Findings of fact 'are subject to the clearly erroneous standard of review. A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with a definite and firm conviction that a mistake has been committed.'" State v. Enos, 147 Hawai'i 150, 158-59, 465 P.3d 597, 605-06 (2020) (quoting State v. Rapozo, 123 Hawai'i 329, 336, 235 P.3d 325, 332 (2010)).

⁴ The second alleged intervening act relied upon by the Majority-Mr. Lee allegedly attempting to strike Sergeant Cobb with the sword-also occurred after Mr. Lee's brother withdrew his consent to the officers' entry to the home.

The Majority's ruling that Mr. Lee lost his right to privacy notwithstanding his family's pleas that the police officers leave their home and leave Mr. Lee alone portends consequences replete with danger, violence, and loss of respect for law enforcement the exclusionary rule was meant to prevent. As demonstrated by the facts of this case, without his right to privacy and his right to be free from unreasonable search and seizure, Mr. Lee fell victim to the use of police violence and subsequent criminal prosecution arising from his opposition to the unconsented entry by police into his bedroom.

Conclusion

The police were not required to take action against Mr. Lee. He was constitutionally protected from their intrusion into his bedroom after he declared he did not need assistance and asked the police officers to leave. The circuit court correctly recognized Mr. Lee's right, under the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution, to be free from the illegal entry into his bedroom by the police when it applied the exclusionary rule to preclude introduction of evidence gained from the illegal entry.

/s/ Michael D. Wilson

