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SCWC-19-0000465

IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII, Petitioner/Plaintiff-Appellant,

vs.

MICAH S.K. VASCONCELLOS, Respondent/Defendant-Appellee.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-19-0000465; CASE NO. 1DTA-18-02776)

DISSENT BY WILSON, J.

I respectfully dissent to the Majority's holding that Micah S.K. Vasconcellos ("Vasconcellos") was not in custody at the time he was asked the medical rule-out questions.

**I. Vasconcellos was in custody at the time of the medical rule-out questions because the officer had probable cause to arrest him for reckless driving**

As stated in my omnibus dissent to State v. Sagapolutele-Silva, 151 Hawai'i 283, 511 P.3d 782 (2022), State v. Skapinok, 151 Hawai'i 170, 510 P.3d 599 (2022) and State v. Manion, 151 Hawai'i 267, 511 P.3d 766 (2022), I respectfully but strongly disagree with the Majority's recent decisions

discarding the settled constitutional protection against self-incrimination provided to those whom the government has probable cause to arrest. Rather than depart from heretofore unquestioned precedent, this court must affirm the common-sense ruling of the district court that a person is in custody, and thus constitutionally entitled to be free from police interrogation, when the police have probable cause to arrest. See, e.g., State v. Ketchum, 97 Hawai'i 107, 34 P.3d 1006 (2001).

Vasconcellos was in custody at the time of the medical rule-out questions, as both the Intermediate Court of Appeals ("ICA") and the District Court of the First Circuit ("district court") held. Officer Ross Borges ("Officer Borges") pulled Vasconcellos over at 2:40 A.M. after witnessing Vasconcellos make a left turn from a straight-only lane. In the process of making that turn, Vasconcellos "very narrowly" missed a pedestrian walking in the crosswalk. Officer Borges specifically noted that Vasconcellos "almost killed" the pedestrian and did not swerve around nor stop for the pedestrian. Officer Borges testified that from the time he executed the stop on Vasconcellos, he had probable cause to arrest him for reckless driving and that Vasconcellos was not free to leave the scene.

Upon stopping Vasconcellos, Officer Borges immediately informed him that he was stopped because "he very narrowly

missed [hitting] the pedestrian in the cross walk." In conversing with Vasconcellos, Officer Borges noted that there was a moderate odor of alcohol coming from the car, that Vasconcellos's eyes were bloodshot and his speech was slurred. Thereafter, Officer Borges asked Vasconcellos to step out of his vehicle and Vasconcellos complied. Officer Borges instructed Vasconcellos to follow him over to the sidewalk. Officer Borges testified that if Vasconcellos did not comply with the request to leave his vehicle, he would have arrested Vasconcellos for reckless driving and operating a vehicle under the influence of an intoxicant ("OVUII"). Officer Borges then asked Vasconcellos if he would participate in a standardized field sobriety test ("SFST") and Vasconcellos eventually agreed. Before administering the SFST, Officer Borges asked Vasconcellos the following medical rule-out questions: "[If he] had any physical defects or speech impediments, if he's currently under the care of a doctor, an eye doctor, or a dentist, if he was diabetic or epileptic, if he was blind in either eye, wearing any contacts, or taking any medications." Vasconcellos answered no to all of the questions. Officer Borges testified that if Vasconcellos had refused to participate in the SFST, he would have arrested him for reckless driving and OVUII. At some point during this interaction, another officer also arrived on the scene.

Vasconcellos was in custody at the time of the medical rule-out questions. The circumstances of this stop were such that a reasonable person would believe "that he or she was not free to go[,]" as evidenced by the sensible testimony of Officer Borges here that Vasconcellos was indeed, not free to leave. Ketchum, 97 Hawai'i at 125, 34 P.3d at 1024. Vasconcellos was pulled over by Officer Borges at 2:40 A.M. and immediately told that the reason for the stop was because he nearly hit a pedestrian. Moreover, Officer Borges testified to having probable cause to arrest Vasconcellos for reckless driving from the moment he initiated the stop. As this court stated in in State v. Ah Loo, "if the detained person's responses to a police officer's questions provide the officer with probable cause to arrest . . . the officer is—at that time—required to inform the detained person of his or her constitutional rights against self-incrimination and to counsel, as mandated by Miranda and its progeny." 94 Hawai'i 207, 212, 10 P.3d 728, 733 (2000) (citations omitted). Here, Vasconcellos' actions (making an illegal turn and almost hitting and killing a pedestrian, and later acknowledging that he saw the pedestrian) provided Officer Borges with probable cause to arrest him for reckless driving. What is more, if Vasconcellos refused to either leave his vehicle or participate in the SFST, Officer Borges testified that he would have, in fact, arrested him.

In sum, Vasconcellos was in custody for purposes of Miranda because (1) Officer Borges had probable cause to arrest Vasconcellos for reckless driving and OVUII, see Ketchum, 97 Hawai'i at 126, 34 P.3d at 1025 ("a person is in custody...if an objective assessment of the totality of the circumstances reflects that...probable cause to arrest has developed") (citations omitted); and (2) a reasonable person in Vasconcellos's situation—pulled over at 2:40 A.M., told that he almost hit a pedestrian, asked to step out of his vehicle, asked to participate in a SFST, and approached by two officers—would not feel free to simply return to his vehicle and drive away. State v. Kauhi, 86 Hawai'i 195, 203, 948 P.2d 1036, 1044 (1997) ("Generally, a person is seized if, from an objective standpoint and given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave.") (citations and quotations omitted).

**II. The medical-rule out questions constitute interrogation because they are reasonably likely to elicit an incriminating response**

Because Vasconcellos was in custody, it must be determined whether the medical rule-out questions constitute interrogation. State v. Joseph, 109 Hawai'i 482, 493-94, 128 P.2d 795, 806-07 (2006); State v. Tringue, 140 Hawai'i 269, 277, 400 P.3d 470, 478 (2017) (explaining that the two triggers for the Miranda requirement are "custody" and "interrogation"). The

district court and the ICA correctly concluded that the medical rule-out questions constitute interrogation, and thus, suppressed Vasconcellos's answers to the medical rule-out questions because the failure to provide him with Miranda warnings violated his constitutional right against self-incrimination.

The touchstone of interrogation is "whether the police officer should have known that [their] words or actions were reasonably likely to elicit an incriminating response from the [d]efendant." State v. Kazanas, 138 Hawai'i 23, 37, 375 P.3d 1261, 1275 (2016) (citations omitted). An incriminating response refers to both inculpatory and exculpatory responses. State v. Eli, 126 Hawai'i 510, 522, 273 P.3d 1196, 1208 (2012) (citing Joseph, 109 Hawai'i at 495, 128 P.3d at 808)). Here, Officer Borges should have—and did—know that the medical rule-out questions were reasonably likely to elicit an incriminating response from Vasconcellos. Officer Borges testified that the purpose of asking the medical-rule out questions was to focus his attention on the results of the SFST as being caused by intoxication rather than a medical or physical condition. That is, if a suspect answers "no" to the medical rule-out questions, Officer Borges is more likely to infer that poor performance on the SFST is due to intoxication, rather than a medical or physical condition. Relatedly, Officer Borges testified that,

if a suspect responds that they are taking a certain medication (such as medical marijuana), that could cause him to arrest the suspect for OVUII. Accordingly, because the medical rule-out questions are reasonably likely to elicit an incriminating response, they constitute interrogation. Therefore, as a suspect in custody, Vasconcellos was protected by the right against self-incrimination and could not be asked incriminating medical rule-out questions unless the questions were preceded by Miranda warnings.<sup>1</sup>

### III. Conclusion

For the foregoing reasons, I respectfully dissent to the Majority's decision to vacate the ICA's July 2, 2020 judgment on appeal and the district court's May 28, 2019 judgment.

DATED: Honolulu, Hawai'i, November 2, 2022.

Michael D. Wilson



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<sup>1</sup> Because it was not raised on certiorari, this dissent does not address the validity of the ICA's decision to vacate the district court's suppression of Vasconcellos's other statements (including Vasconcellos's statements after being told the reasons for the investigatory stop and being asked to participate in the SFST, and Vasconcellos's performance on the SFST).