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NO. CAAP-21-0000679

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
CHARLES TUNG MIN YUEN, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HONOLULU DIVISION)
(CASE NO. 1DTA-18-03510)

SUMMARY DISPOSITION ORDER

(By: Leonard, Presiding Judge, Hiraoka and Nakasone, JJ.)

Defendant-Appellant Charles Tung Ming Yuen (**Yuen**)
appeals from the Notice of Entry of Judgment and/or Order and
Plea/Judgment, entered on December 11, 2019 (**2019 Judgment**), and
the Notice of Entry of Judgment and/or Order and Plea/Judgment,
entered on November 12, 2021 (**Restitution Judgment**), in the
District Court of the First Circuit, Honolulu Division (**District
Court**), convicting Yuen of Operating a Vehicle Under the

Influence of an Intoxicant (**OVUII**),¹ in violation of Hawaii Revised Statutes (**HRS**) § 291E-61(a)(1) and (b)(1) (2020).²

The charge arose from an October 25, 2018 incident in which Yuen was allegedly involved in a motor vehicle collision about 50 feet outside the gate to Hickam Air Force Base.

Yuen raises four points of error, contending that: (1) the District Court did not have jurisdiction because the Complaint was fatally defective pursuant to HRS § 805-1 (2014), Hawai'i Rules of Penal Procedure (**HRPP**) Rule 47(d), and State v. Thompson, 150 Hawai'i 262, 500 P.3d 447 (2021); (2) because the Complaint was fatally defective, Yuen's arraignment did not comply with HRPP Rule 5(b); (3) Yuen's trial counsel provided ineffective assistance of counsel because he failed to file a motion to suppress based on a violation of the Posse Comitatus Act (**PCA**)³, the Fourth Amendment of the U.S. Constitution, and/or

¹ The Honorable John A. Montalbano presided over trial, sentencing, and entry of the 2019 Judgment. The Honorable Alvin K. Nishimura entered the Restitution Judgment.

² HRS § 291E-61 provides, in most relevant part:

§ 291E-61 Operating a vehicle under the influence of an intoxicant. (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:

- (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;

³ At the time relevant to this case, 18 U.S.C. § 1385 (1994) (*i.e.*, the PCA) stated as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,
(continued...)

article I, section 7 of the Hawai'i Constitution; and (4) there was insufficient evidence to establish Yuen's guilt beyond a reasonable doubt.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Yuen's points of error as follows:

(1) Yuen contends that the Complaint does not meet the requirements of HRS § 805-1, HRPP Rule 47(d), and Thompson, because it was not signed by either of the two Honolulu Police Department (**HPD**) officers who conducted Yuen's OVUII investigation and arrest.

However, HRS § 805-1 does not apply to the Complaint because it does not seek a penal summons or an arrest warrant. See State v. Mortensen-Young, 152 Hawai'i 385, 396, 526 P.3d 362, 373 (2023) (limiting the applicability of HRS § 805-1 and its holding in Thompson to complaints seeking a penal summons or arrest warrant). In OVUII prosecutions, the prosecution of complaints is analyzed under HRPP Rule 7. See, e.g., State v. Primo, No. CAAP-22-0000342, 2023 WL 3531691, *3 (Haw. App. May 18, 2023) (SDO) (citing Mortensen-Young, 152 Hawai'i at 399, 526

³(...continued)

willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

P.3d at 376). Here, the deputy prosecuting attorney signed the Complaint consistent with HRPP Rules 7(d) and 47(d).

Accordingly, we conclude that Yuen's first point of error is without merit.

(2) Yuen argues that his arraignment was defective pursuant to HRPP Rule 5(b) because he was arraigned on a fatally defective Complaint. In light of our ruling that the Complaint was not defective, this claim is meritless.

(3) Yuen argues that his trial counsel was ineffective for failing to file a motion to suppress all evidence obtained by HPD based on an alleged violation of the PCA, the Fourth Amendment and/or article I, section 7. We review a claim of ineffective assistance of counsel to determine whether "viewed as a whole, the assistance provided was 'within the range of competence demanded of attorneys in criminal cases.'" State v. De Guair, 108 Hawai'i 179, 187, 118 P.3d 662, 670 (2005).

The burden of establishing ineffective assistance rests with the defendant and can only be met by demonstrating specific errors or omissions resulted in the withdrawal or substantial impairment of a meritorious defense.

Determining whether a defense is potentially meritorious requires an evaluation of the possible, rather than the probable, effect of the defense of the decision maker. . . . Accordingly, no showing of actual prejudice is required to prove ineffective assistance of counsel.

Id. (citations and internal quotation marks omitted).

Yuen claims his trial attorney was ineffective because counsel failed to file a motion to suppress evidence based on the military officers' detention and administration of a standard

field sobriety test (**SFST**) and preliminary alcohol screening (**PAS**) of Yuen prior to HPD's arrival, arguing that these actions violated the PCA, the Fourth Amendment, and/or article I, section 7. Yuen asserts that, by conducting an OVUII investigation and detaining Yuen on state or county property, the military officers were directly involved with civilian law enforcement of the state OVUII law and thus violated the PCA. Yuen argues that this military detention, investigation, and the resulting information provided to HPD led responding HPD officers to believe that Yuen operated one of the vehicles involved in the collision, and to conduct their own SFST and PAS apart from the military officers' SFST and/or PAS and ultimately arresting Yuen. Yuen further contends that, if the military officers did not have the requisite reasonable suspicion to justify their initial seizure of Yuen, HPD's investigation was a "fruit of the poisonous tree" of the initial illegal seizure by the military officers.

The PCA "prohibits Army and Air Force military personnel from participating in civilian law enforcement activities." United States v. Chon, 210 F.3d 990, 993 (9th Cir. 2000). The Hawai'i Supreme Court has acknowledged that "direct involvement of military personnel in civilian law enforcement is generally prohibited." State v. Pattioay, 78 Hawai'i 455, 460, 896 P.2d 911, 916 (1995). There are, however, exceptions to the PCA. The Ninth Circuit uses three tests to determine whether military involvement in civilian law enforcement was an exception

to the PCA: "The involvement must not 'constitute the exercise of regulatory, proscriptive, or compulsory⁴ military power,' must not 'amount to direct active involvement in the execution of the laws,' and must not 'pervade the activities of civilian authorities.'" United States v. Khan, 35 F.3d 426, 431 (9th Cir. 1994) (quoting United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991)); see also United States v. Hitchcock, 103 F.Supp.2d 1226, 1228 (D. Haw. 1999). "If any one of these tests is met, the assistance is not indirect." Khan, 35 F.3d at 431.

In Pattioay, testimony at a hearing on a motion to suppress established that there was a joint operation between the Army Criminal Investigation Department (**CID**) and HPD investigating the civilian appellees for drug trafficking. 78 Hawai'i at 456-57, 896 P.2d at 912-13. At that hearing, an Army military police officer (**MP**) who operated as an undercover agent in the investigation, an Army CID special agent, and an HPD officer testified regarding the investigation. Id. Ultimately, based on the evidence presented at the hearing, the trial court found and concluded that no military function was involved, the matter was clearly within the scope of civilian law enforcement responsibility, and the military control and involvement was pervasive and part of a pattern of conduct. Id. at 459, 896 P.2d

⁴ "A power regulatory in nature is one which controls or directs A power proscriptive in nature is one that prohibits or condemns A power compulsory in nature is one that exerts some coercive force." United States v. Yunis, 681 F.Supp. 891, 895 (D.D.C. 1988).

at 915. Evidence involving the direct assistance of the military, as well as evidence obtained with no member of the military directly involved in the search was suppressed. Id. On the State's appeal, the supreme court held that the appellees met their burden to demonstrate that the joint operation violated the PCA "through the testimony of Army CID agent Foster and, ironically, the approval request and authorization documents that defense counsel objected to during the suppression hearing." Id. at 466, 896 P.2d at 922.

In affirming that there was a violation of the PCA, the supreme court ruled that suppression of the evidence at issue was warranted:

We hold that it is imperative in this case to suppress the evidence obtained in violation of the PCA because to ignore the violation and allow the evidence to be admitted would be to justify the illegality and condone the receipt and use of tainted evidence in the courts of this state. In this instance, where government agents have clearly violated federal law, we conclude that the principles supporting the exclusionary rule in this state mandate suppression of the evidence.

Id. at 469, 896 P.2d at 925.

Here, no military personnel testified at Yuen's trial, although such testimony is not requisite to finding a violation of the PCA. The record reflects that the State and Yuen's trial attorney represented that the military detained Yuen pending HPD's arrival, identified him as the Unit 1 vehicle driver, and subjected Yuen to a SFST and/or PAS. The District Court did not allow an HPD officer's testimony that military personnel informed them that Yuen was the driver of the Unit 1 vehicle, expressing

concern for any potential violations of the PCA and warning the State to caution its witnesses on refraining from testifying on statements made to them by the military officers. Neither the State nor Yuen's attorney attempted to introduce the military's reported SFST and/or PAS into evidence.

We conclude that the record on appeal is insufficient to establish a violation of the PCA. Nor is the record sufficient to determine whether Yuen's seizure by military officers was constitutionally infirm. We further note that Yuen's trial attorney has not been given a chance to respond to these allegations of ineffectiveness.⁵ On this record, we cannot conclude that trial counsel's failure to file a motion to suppress constituted an error or omission which resulted in the withdrawal of a potentially meritorious defense. However, it appears that Yuen has alleged facts that, if proven, might entitle him to relief, and that his claims of ineffective assistance of counsel for failure to file a motion to suppress based on a violation of the PCA, the Fourth Amendment, and/or article I, section 7 are not patently frivolous and without trace of support in the record. See State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993). Accordingly, we decline to vacate Yuen's conviction based on ineffective assistance of counsel, but we will affirm Yuen's conviction without prejudice to a

⁵ Hawaii Rules of Appellate Procedure Rule 28(a) requires such service, stating in part: "[i]f a brief raises ineffective assistance of counsel as a point of error, the appellant shall serve a copy of the brief on the attorney alleged to have been ineffective."

subsequent HRPP Rule 40 petition on his ineffective assistance of counsel claim where a factual record can be developed.

(4) Yuen contends that there was no substantial evidence to support his conviction because the State failed to prove that he was the operator of the vehicle.

In reviewing a challenge to the sufficiency of the evidence, evidence adduced in the trial court must be considered in the strongest light for the prosecution. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Williams, 149 Hawai'i 381, 392, 491 P.3d 592, 603 (2021)

(citations and internal quotation marks omitted).

HPD Officer Jody Peter testified that upon her arrival to the scene of the motor vehicle collision, Yuen was the sole occupant seated in the Unit 1 vehicle, and a driver and two small children were seated in the Unit 2 vehicle. Officer Peter observed damage to the rear bumper of the Unit 2 vehicle, but no damage to the Unit 1 vehicle.

When a second HPD Officer, Officer Jennifer Laganse, arrived on the scene of the motor vehicle collision near Hickam Gate, she observed two cars with their hazard lights on. Officer Laganse was asked at trial whether she interacted with either of the drivers, and she responded that she interacted with Yuen. Officer Laganse also testified, without objection, that "Corporal Peter" identified Yuen as a driver.⁶

⁶ Officer Laganse testified at least two more times, without objection, that Yuen was identified to her as a driver.

A person can be proven to be the driver of a vehicle based on "reasonable inferences drawn from circumstantial evidence." State v. Brown, 97 Hawai'i 323, 333, 37 P.3d 572, 582 (App. 2001) (citation omitted); see also State v. Lioen, 106 Hawai'i 123, 134, 102 P.3d 367, 378 (App. 2004). The testimony of Officers Peter and Laganse is sufficient circumstantial evidence to support a finding that Yuen operated the Unit 1 vehicle.

For these reasons, the 2019 Judgment and the Restitution Judgment are affirmed without prejudice to a subsequent HRPP Rule 40 petition on Yuen's ineffective assistance of counsel claim.

DATED: Honolulu, Hawai'i, September 22, 2023.

On the briefs:

Alen M. Kaneshiro,
for Defendant-Appellant.

Brian R. Vincent,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

/s/ Katherine G. Leonard
Presiding Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Karen T. Nakasone
Associate Judge