

NOT FOR PUBLICATION

NO. 26195

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALBERT BARONA, Defendant-Appellant,
and
KELII ENOMOTO, Defendant

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STATE OF HAWAII

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APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 02-1-2277)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Albert Barona (Barona) appeals from the Judgment filed on October 13, 2003 in the Circuit Court of the First Circuit^{1/} (circuit court). Barona was convicted of Unauthorized Control of Propelled Vehicle, in violation of Hawaii Revised Statutes (HRS) § 708-836 (Supp. 2004); Driving Without License, in violation of HRS § 286-102 (Supp. 2004); and Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243 (Supp. 2004).

On appeal, Barona contends (1) he was deprived of his right to a fair trial because, at a voluntariness hearing, his prior statements were determined to be voluntary when the statements should have been ruled involuntary; and (2) the circuit court erred by denying his Motion for Judgment of

^{1/}The Honorable Karen S. S. Ahn presided.

Acquittal because no reasonable jury could have found him guilty of Promoting a Dangerous Drug in the Third Degree and Unauthorized Control of Propelled Vehicle.

I. BACKGROUND

On October 18, 2002, Barona was charged by complaint with Unauthorized Control of Propelled Vehicle (UCPV), Driving Without License, Promoting a Dangerous Drug in the Third Degree (Drug Promoting Third), and Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993).

At trial, during the State's presentation of evidence, Angeline Dickson (Dickson) testified that she was the registered owner and title holder of a blue Honda Civic, license plate JCE-054, (Honda) that she reported missing on June 12, 2002 from her parking space at her apartment building. The primary driver of the Honda was Christopher Silva (Silva), her boyfriend. Initially, she had two sets of keys for her Honda; she had lost one set at her mother's house and Silva had the other set. On June 12, she reported the missing Honda to the police and told the police what the car looked like and the license plate number. The police looked up the vehicle identification number (VIN). From June 12, 2002 to October 9, 2002, she did not sell the Honda and she did not authorize anyone beside Silva to drive the Honda. She did not know Benito Laboy (Laboy), Christopher Cabrera (Cabrera), Kelii Enomoto (Enomoto) or Barona.

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Dickson testified that on October 9, 2002, she was notified by police that her Honda had been recovered. When she went to the tow yard to retrieve her car, she noticed that the Honda was a different shade of blue, there was a different tint on the windows, and the door locks were punched out (no key hole, just a hole). She also noticed there was no ignition, there were wires hanging everywhere, and there was a different back seat, steering wheel cover, stereo deck, speakers, and speaker box. She did not bring the car keys to the tow yard since she was told there was no ignition or locks on the car.

Silva testified and confirmed Dickson's testimony as to the alterations done to the vehicle. He also stated that the rims and muffler had been changed. At the tow yard, he used a screwdriver that was in the car to start the vehicle by putting it into "that one piece that was hanging down." He explained that "[t]he piece that the ignition turns to start it, they ripped the ignition out, pulled the brown piece out, and then all you do is just turn that round piece. It was just hanging down, you just turn it[.]" He did not know Laboy, Cabrera, Enomoto, or Barona. He also confirmed that between June 12, 2002 to October 9, 2002, he did not give any of these individuals permission to drive the Honda.

Honolulu Police Department (HPD) Officer Neville Colburn (Officer Colburn) testified that he was assigned to

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uniform patrol division, District 7, night operations. On October 9, 2002 at around 12:50 a.m., he was on duty and traveling makai-bound on Hawaii Kai Drive, approaching Kalaniana'ole Highway. He observed a blue four-door Honda Civic with a defective right rear taillight (there was a hole in the lens from which a bright white light was shining) and with a rear license plate (FFG-533) that had no tax decal. Officer Colburn ran a check of the license plate with his mobile data computer, which showed there should have been a valid decal for that plate. The safety check decal affixed to the Honda showed an expiration date of November 2002, but the computer showed the safety check had already expired in March 2002.

Officer Colburn testified that the area where he stopped the Honda had very good lighting from the continuous overhead street lighting and building lighting from the shopping center parking lot. Officer Colburn approached the vehicle and determined there was a male in the driver's seat. Colburn identified the driver as Barona. There were three other occupants in the Honda with Barona, later identified as Winona Taylor (front passenger), Boysen Aipolani (Aipolani) and Enomoto (two rear passengers).

In the midst of Officer Colburn's testimony, Barona's counsel asked that a voluntariness hearing be conducted as to any statements Barona may have made to Officer Colburn. Although

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Barona did not make a formal statement to the police, Barona did make statements to Officer Colburn in response to questions he was asked by Colburn. The circuit court heard testimony from Officer Colburn outside the jury's presence and determined that Barona's statement that he had just bought the car and his responses of two false names when asked his identity by Colburn were admissible.

When the jury reconvened, Officer Colburn testified that upon approaching the Honda, he asked Barona if the car was his and Barona replied "yeah, we just bought 'em." Officer Colburn explained that the question of ownership was a routine question police officers ask in traffic stops. Officer Colburn testified that he next asked Barona for his driver's license, vehicle registration (registration), and no-fault insurance card, and Barona responded that he did not have his driver's license. Officer Colburn asked Barona whether Barona had anything that could be used to identify him so Colburn could run a check to determine if Barona had a license. Officer Colburn stated that Barona responded he did not have anything on him that could be used to identify him.

Officer Colburn testified that Barona seemed pretty nervous and almost immediately started sweating profusely. Barona stared straight ahead and was mumbling while talking, such that Colburn had to instruct Barona to speak up.

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Officer Colburn testified that since Barona did not have any type of identification on him, Officer Colburn asked Barona for his name, date of birth, and social security number -- things routinely used to run checks on people. Barona stated that his name was Rodney L. Baron and his birth date was December 1960. Officer Colburn asked Barona how old he was; Barona said he was 33. Because the birth date and age did not match up, Officer Colburn testified he "pointed out [to Barona] that some, if not all, of the information that he gave was incorrect." Barona then gave Officer Colburn the name Francis L. Kaina along with a birth date and social security number. Officer Colburn again asked Barona how old he was, and Barona again provided an age that did not match with the given birth date.

When Officer Colburn checked with dispatch on both of the names provided by Barona, the response from dispatch was that there was "no record with no birth dates and social security numbers that were provided." After Officer Colburn pointed out to Barona that he was going to be arrested for driving without a valid driver's license and his fingerprints would establish his identity, Barona provided his real name to Colburn. Officer Colburn checked with dispatch regarding Barona's license status and was informed that Barona did not have a valid driver's license.

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Officer Colburn testified that while he was waiting for the status of Baron's license, he asked Barona for a no-fault insurance card and the registration. Barona reached into the glove compartment and pulled out several cards and papers, but all of the insurance cards had expired in 2001 and none of the cards were in his name. Barona did provide Officer Colburn with a registration and certificate of title (title). The title was for the rear plate and the name on it was Christopher Cabrera. Officer Colburn noted:

[I]t appeared that Mr. Cabrera had sold it, or at least the portion for the signature of the owner, once they sell their car, had been filled in. In fact, I think it had been dated sometime in January of 2002. The odd thing about that is the notice of transfer was still stuck to the title, which normally when a vehicle is sold, the seller is required by law to submit that notice of transfer within 10 days of the sale, which had not been done in this instance.

The registration was for a different license plate, but also in the name of Christopher Cabrera. The registration showed that "FFG" was a previous license plate and JTX-297 was the current license plate. In Officer Colburn's mind, the registration and title that Barona presented to him were not valid for the license plate on the rear of the vehicle.

Officer Colburn checked the front license plate and found that the front license plate did not match the rear license plate. He then checked the VIN plate on the dashboard, noting that one of the rivets on the plate had been removed and it appeared the VIN plate had been tampered with. He also checked

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the VIN on the fire wall inside the engine compartment (etched on by the manufacturer) and noticed it did not correspond with the VIN on the dashboard, on the registration, or on the title. He noted that the VIN on the dashboard did correspond with the VIN on the registration and title.

Officer Colburn ran a check of the firewall VIN with dispatch and was told by dispatch that the Honda was a stolen vehicle. Dispatch also informed him the front plate was for a Pontiac and the rear plate was a retired license plate for a Honda (meaning a new plate had been issued and the old plate was no longer valid). The registered owner of the front plate was Laboy's mother.

Officer Colburn also testified to the observations of the Honda he made while speaking with Barona: "There was damage to the steering column; it looked as if at least a portion of it had been removed. There were wires hanging down from the ignition and steering column and what looked like a portion of the ignition tumbler was also hanging down from the [steering] column as well." Based on his eleven years on the police force and the hundreds of UCPV arrests he had been involved in, it appeared to him that the vehicle might be a stolen vehicle. Once it was determined from the firewall VIN that the vehicle was stolen, Barona was placed in a police car. The other passengers were placed in separate police cars.

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Police Officer Frederick Apo (Officer Apo) testified that he was instructed by Officer Colburn to process the Honda. Officer Apo took photographs of the front and rear license plates and the internal part of the steering. He also recovered as evidence the license plates, the VIN strip from the dash, and the title and registration from the Honda. He noted the VIN strip was loose when he touched it and one of the rivets appeared shinier than the other.

Police Officer Theodore Hackbarth (Officer Hackbarth) testified that he processed the Honda for fingerprints, photographs, and any evidence inside the car. Between the driver's seat and center console, Officer Hackbarth discovered a glass pipe, a butane lighter, and a butane refill canister. Based on his training and experience on the downtown task force dealing with drug cases, Hackbarth testified that the glass pipe he photographed was normally used to smoke "ice" (methamphetamine) and the brownish-white residue inside the glass pipe was consistent with "ice." He testified that the location of the glass pipe was an inch or two from the driver's leg, about eight inches from the front passenger, and two to three feet from the rear passengers.

Officer Hackbarth testified that he dusted the glass pipe, butane lighter, and butane canister for fingerprints, but

he only had smudged prints and not enough to make a clear distinction as to whose fingerprints were on the pipe.

Criminalist Leighton Kalapa (Kalapa) testified that "[a] criminalist is responsible to analyze any evidence that's submitted to the crime lab that might be in connection with any crime that was committed." His primary duty at the crime lab was to identify and analyze drugs. He had done thousands of analyses on substances to determine if the substances contained methamphetamine. He testified that, to a reasonable degree of scientific certainty, the substance contained within the glass pipe was methamphetamine.

At the close of the State's case, Barona's counsel made a motion for judgment of acquittal, stating "[a]t this time, I'm not sure whether or not the State has made a prima facie showing, and we ask that these charges be dismissed." The circuit court denied the motion, finding that "a reasonable jury could conclude guilt beyond a reasonable doubt as to all counts."

Inga Bertelman (Bertelman), Barona's fiancée, testified that Barona had bought a motorcycle from Enomoto for \$900, but Enomoto had taken back the motorcycle to fix the smashed side. Enomoto came back with the Honda instead of the motorcycle. She testified that Enomoto said he had gotten arrested on the bike and the bike was stolen. She saw Enomoto give Barona the Honda registration and title. Bertelman was going to register the

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Honda in her name, but never did so. Bertelman looked at the documents, but did not check the VIN's to see if they matched up or look to see if the license plates matched each other.

Bertelman testified that when she and Barona got the Honda, it was intact with no wires hanging and with a remote to unlock the doors. She stated that from the first day they got the Honda, the key would get stuck in the ignition.

Bertelman testified that on October 8, 2002 she dropped off Barona around 5:00 p.m. at her friend Stacey's house. She stated that when she dropped off Barona, the Honda was "all apart, the doors were open, and everything was all apart. Like the wires were hanging, and I was wondering -- I was grumbling with [Barona], what is going on, you know, why is it all in pieces." The Honda had also been worked on at her friend Kathy's house a few days before the date of the Barona's arrest.

Enomoto testified that he had purchased the Honda from Laboy, his neighbor and classmate, around October 2, 2002. Enomoto had asked Laboy if the Honda was legitimate and for the vehicle's paperwork. Laboy provided Enomoto with the title, registration, safety check, and an expired insurance card. Enomoto checked the VIN on the title to the VIN on the dashboard to see if someone had tampered with the VIN. After having worked for a repossession company and an auction company, he could tell by looking at a VIN if someone had altered it. He stated that

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there were quite a few back-up VIN's on a car to check to make sure it was the right car. He did not check any of the back-up VIN's on the Honda because he was in a rush. He did not look to see if the front license plate matched the back license plate.

Enomoto testified that the title did not have Laboy's name on it and he questioned Laboy about it. He confirmed that he knew the registered owner of a car was the one who legally owned the car and had the title and registration. Despite the fact that it was his intent at the time he purchased the Honda to use the car for his personal use, he did not send in the transfer of ownership papers in case he later decided to sell the car.

Enomoto stated that when he bought the Honda "[i]t looked fine to me. It had keys, it had stereo, a CD player, it had rims on it, it had the remote for the alarm, the alarm worked. It looked fine to me." At that time, the wires were not hanging down near the steering column of the vehicle.

Enomoto further testified that on October 4 or 5, 2002, he gave Barona the Honda. After he gave the Honda to Barona, Barona called him and said there was a problem with the ignition. He met Barona on October 8 at Stacey's house. Enomoto took off the bottom panels under the steering column, where all the wires were, and unscrewed the ignition. He denied that what he did would be classified as hotwiring the Honda, but admitted that, at that point, the Honda could have been started with any type of

object (such as fingernail or screwdriver). He also rewired the stereo system, put in new speakers, and finished tinting the driver and passenger side windows.

Enomoto confirmed that he was also arrested on the date of the incident and charged with UCPV for the same car. He pled no contest to the charge of UCPV, but maintained that he was unaware the car had been reported stolen.

Aipolani testified that, two to three days prior to the incident, he had seen the Honda when Barona and Enomoto brought the car to Kathy's house to tint the windows. Aipolani knew that Barona owned the car and had purchased it from Enomoto. He next saw the Honda on October 8 when the car windows were being tinted and the car was being taken apart. Barona, Enomoto, and Aipolani left Kathy's house before 5:00 p.m. and went to Stacey's house. Aipolani testified that between 5:00 and 10:00 p.m. he was sitting in the back seat of the Honda at Stacey's house because Enomoto wanted to fix the car.

Aipolani further testified that he, Barona, and Enomoto picked up Winona Taylor (Winona) that evening at around 10:00 or 11:00 p.m. That evening, Enomoto and Winona smoked out of the pipe, but, as for Barona, Aipolani testified "[n]ot that I could see him." He stated that Enomoto and Winona were smoking in front of Barona in the car and confirmed that the pipe was in the possession of Winona and Enomoto at all times. Aipolani was

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paying attention to Barona as Barona was driving and could see what Barona was doing while driving, which included holding the wheel and smoking a cigarette.

Aipolani testified that when the police stopped the Honda, he was sitting directly behind the driver's seat. Officer Colburn asked everyone for identification, but only Aipolani had identification. While Officer Colburn took Aipolani's identification to his car to call it in, Barona was looking out of the window and Enomoto and Winona were passing the pipe back and forth. Enomoto and Winona passed the pipe by the passenger side door for about ten minutes before Officer Colburn came back to the Honda. The last time Aipolani saw the pipe, Enomoto had it and had reached over and put the pipe in the center of the car to the right of the driver's seat. Aipolani testified that the butane lighter and butane canister were his. They were in the center console area because Barona needed to use the lighter to light his cigarette. Because the lighter ran out of fuel, Aipolani was carrying the canister with him. He stated that he knew the content of the glass pipe was crystal meth.

Barona testified and confirmed that Enomoto gave him the Honda to make up for the money Barona had paid Enomoto for a motorcycle. Enomoto gave Barona the Honda to use while Enomoto took back the motorcycle to do some work on it. Barona testified that two days later, Enomoto came back to his house with the

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paperwork for the Honda and told Barona the Honda was his. His understanding of what happened to the motorcycle was that Enomoto "got pulled over and the bike got confiscated." Barona did not look at the registration or title for the Honda that Enomoto gave him. He also did not check the license plates. He stated that he asked Enomoto to check if everything was legitimate with the Honda and Enomoto told him that the papers matched the license plate and VIN.

Barona did not receive the Honda with the wires already dangling. He testified that Enomoto caused the dangling wires because he told Enomoto to get the car started. The ignition was fine when he initially took possession of the Honda. The problem with the ignition started around October 6. Barona stated that on October 8 he asked Enomoto to help fix the car. Bertelman dropped him off at Stacey's house around 5:00 p.m. on October 8. He left Stacey's house to do personal things and left Aipolani to watch Enomoto. When Barona returned to Stacey's house between 8:00-9:00 p.m., Barona "finally blew" because he had left Enomoto to fix the car, but Enomoto had been working on the stereo and not the ignition. Barona explained that was when Enomoto caused the dangling wires and taught him how to start the car by using a screwdriver.

Barona testified that he did not actually see someone smoke a pipe in the Honda, but saw "a lot of clouds of smoke in

the car" -- "more like a fog." He was driving and too busy watching the road. He agreed there was a possibility that something else other than his cigarette was smoked in the car. He testified that he never had possession of the pipe, did not touch it, and the pipe was not his; he did not know who owned the pipe; and he never saw the pipe in his car. Barona borrowed the lighter and refill to light his cigarette, and when he placed the items in the console to the right of his seat, there was no pipe there. He did not see Enomoto and Winona passing the pipe back and forth while Officer Colburn was checking Aipolani's identification.

Barona explained that the reason he was sweating a lot when Officer Colburn pulled him over was because he was a diabetic and when his blood sugar was low, he sweated a lot. He did not notice the back seat of the Honda was a different back seat because he did not know what kind of seats "those kinds of cars have." He explained that the reason he gave two false names to Officer Colburn was because he did not have a license.

At the conclusion of Barona's case, Barona's counsel renewed his motion for judgment of acquittal, and the circuit court denied the motion.

On August 8, 2003, the jury found Barona guilty of UCPV, Driving without License, and Drug Promoting Third and not guilty of Unlawful Use of Drug Paraphernalia. On August 8, 2003,

the circuit court filed the Judgment of Acquittal as to Unlawful Use of Drug Paraphernalia. On October 13, 2003, the circuit court filed the Judgment, and Barona timely filed this appeal.

II. STANDARDS OF REVIEW

A. Motion for a Judgment of Acquittal

The standard to be applied by the trial court in ruling upon a motion for a judgment of acquittal is whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the trier of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. An appellate court employs the same standard of review.

State v. Pone, 78 Hawai'i 262, 265, 892 P.2d 455, 458 (1995) (brackets omitted) (quoting State v. Alston, 75 Haw. 517, 528, 865 P.2d 157, 164 (1994)).

B. Voluntariness of Statement

We apply a *de novo* standard of appellate review to the ultimate issue of the voluntariness of a confession. We thus examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of the circumstances surrounding the defendant's statement.

State v. Gella, 92 Hawai'i 135, 142, 988 P.2d 200, 207 (1999) (internal quotation marks, citations, and brackets omitted) (quoting In re John Doe, 90 Hawai'i 246, 251, 978 P.2d 684, 689 (1999)). "However, it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trial judge." Gella, 92 Hawai'i at 142, 988 P.2d at 207 (internal quotation marks and citation omitted).

Our review of whether a defendant's statement was in fact coerced requires determination of whether the findings of the trial court are clearly erroneous. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed.

Id. (internal quotation marks, citations, and brackets omitted) (quoting State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996)).

III. DISCUSSION

A. Voluntariness of Barona's Statement

Barona contends the circuit court deprived him of his right to a fair trial because it determined his prior statements were voluntary when it should have ruled the statements were involuntary under the circumstances.

The Hawai'i Supreme Court stated in State v. Kuba, 68 Haw. 184, 706 P.2d 1305 (1985):

The facts of this case are almost indistinguishable from the facts presented in State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984). We noted there that the stopping of an automobile and the detaining of its occupants for a brief period during a traffic stop constituted a seizure within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution Where, however, the seizure of the defendant is reasonable to investigate a traffic violation and the investigating police officer engages in legitimate, straightforward, and noncoercive questioning necessary to obtain information to issue a traffic citation, there is no custodial interrogation; no *Miranda* warnings are required before the police officer begins asking questions.

Id. at 188, 706 P.2d at 1309 (citations omitted; emphasis added).

In State v. Ah Loo, 94 Hawai'i 207, 10 P.3d 728 (2000), the Hawai'i Supreme Court concluded that

generally speaking, a person lawfully subjected to a temporary investigative detention by a police officer -- who has a reasonable suspicion that is based on specific and articulable facts that criminal activity is afoot -- is not subjected to "custodial interrogation" when the officer poses noncoercive questions to the detained person that are designed to confirm or dispel the officer's reasonable suspicion. Indeed, it is the very purpose of such an investigatory stop to allow the officer to confirm or deny his or her reasonable suspicions by reasonable questioning, rather than forcing in each instance the "all or nothing" choice between arrest and inaction.

Id. at 211, 10 P.3d at 732 (internal quotation marks, citations, and brackets omitted; emphasis added).

In Ah Loo, police officers observed several people, who appeared under the age of twenty-one, drinking beer and standing around a truck. The officers detained the group to ascertain each person's age. An officer asked Ah Loo to produce identification, and, upon Ah Loo's refusal, the officer asked him his name, age and place of residence. Ah Loo responded he was eighteen, and the officer issued Ah Loo a citation for being a minor in possession of liquor in a public place. At the subsequent trial, Ah Loo attempted to suppress his statement to the officer regarding his age. 94 Hawai'i at 209, 10 P.3d at 730. The supreme court held that an individual may be "seized" and yet not be "in custody," such that *Miranda* warnings are not required. 94 Hawai'i at 211, 10 P.d at 732.

Officer Colburn testified at trial that he stopped the Honda because the rear tail light was broken, there was no tax decal, and there was a discrepancy with the safety check decal. Like Ah Loo, this was a temporary investigative stop. Officer

Colburn also testified that police routinely ask drivers whether they own the vehicle they are driving. We agree with the circuit court's finding that "with all that mismatch on the back of the car, it seems fairly reasonable" that the officer would inquire as to ownership.

Officer Colburn testified that since Barona was unable to produce a license or identification, the officer asked for Barona's name, birth date, and social security number -- information routinely used to run checks on people. He stated that if a driver does not have a license, officers ask for other identification to check if the driver has a license. Like Ah Loo, the purpose of Officer Colburn's investigatory stop was "to allow the officer to confirm or deny his or her reasonable suspicions by reasonable questioning." Ah Loo, 94 Hawai'i at 211, 10 P.3d at 732 (brackets omitted).

We conclude Officer Colburn engaged "in legitimate, straightforward, and noncoercive questioning necessary to obtain information to issue a traffic citation," Kuba, 68 Haw. at 188, 706 P.2d at 1309, and, therefore, there was no custodial interrogation warranting *Miranda* warnings. Since there was no custodial interrogation, the circuit court did not deprive Barona of his right to a fair trial by finding that his statements were voluntary under the circumstances.

B. Motions for Judgment of Acquittal

Barona contends the circuit court erred by denying his motions for judgment of acquittal as to the counts of UCPV and Drug Promoting Third. Barona moved for judgment of acquittal at the close of the State's case and at the end of trial before jury deliberations.

1. Unauthorized Control of a Propelled Vehicle

Barona argues there was insufficient evidence that he "intentionally or knowingly exerted unauthorized control over another's propelled vehicle because he never knew it was stolen."

Hawaii Revised Statutes § 708-836 provides part:

§708-836 Unauthorized control of propelled vehicle.

(1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

(2) "Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

(3) It is an affirmative defense to a prosecution under this section that the defendant:

- (a) Received authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use; or
- (b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.

(4) For the purposes of this section, "owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership; provided that if there is no registered owner of the propelled vehicle or unrecorded owner of the vehicle pending transfer of ownership, "owner" means the legal owner.

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(5) Unauthorized control of a propelled vehicle is a class C felony.

(Emphasis added.)

This court in State v. Palisbo, 93 Hawai'i 344, 3 P.3d 510 (App. 2000), comprehensively reviewed the legislative history of the UCPV statute^{2/} and concluded that

on its face, HRS § 708-836 does not require proof that the accused knew the vehicle involved was stolen. By its plain language, the offense is committed when "the [accused] intentionally exerts unauthorized control . . . by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent." (Emphasis added.) Thus, the statute requires only proof that the defendant's intentional conduct was to accomplish at least one of two objectives, that is, to operate the vehicle or to change the identity of the vehicle without having obtained the owner's consent in either event.

Id. at 353, 3 P.3d at 519 (emphasis in original and added).

During the State's presentation of evidence, Dickson testified that she was the registered owner and title holder of the Honda. The primary driver and only person authorized by Dickson to use the vehicle was Silva. She did not know Laboy, Cabrera, Enomoto, or Barona and did not give authorization to any of them to drive her car. Silva testified that he did not know Laboy, Cabrera, Enomoto or Barona, and did not give any of them permission to drive the Honda. Additionally, both Dickson and Silva testified that when they went to pick up the Honda at the tow yard, the car was a different shade of blue, with different

^{2/}This court analyzed the statute as it appeared in 2000. Subsequently, in 2001, the legislature amended the statute by adding to the definition of "owner" the provision on who the owner is when there is no registered owner. The amendment does not affect the holding of Palisbo.

window tinting, back seat, a stereo deck, speakers, and speaker box. Silva also noted that the rims and muffler had been changed. Finally, Officer Colburn testified that Barona was the driver of the Honda when it was pulled over.

At the close of the State's case, viewing the evidence in the light most favorable to the State and fully recognizing the province of the trier of fact, a reasonable mind might have fairly concluded that Barona intended to operate the Honda or to change the identity of the Honda and had done either act without the consent of Dickson, the registered owner. The circuit court did not err by denying Barona's first motion for judgment of acquittal.

The evidence presented by Barona could have refuted the notion that Barona was responsible for changing the identity of the Honda, but the evidence did not refute that Barona was operating the Honda. The evidence also did not dispute that Dickson had not consented to Barona's operating or changing the identity of the Honda. Therefore, the circuit court did not err by denying Barona's second motion for judgment of acquittal.

2. Promoting a Dangerous Drug in the Third Degree

Barona argues there was no evidence that he was guilty of Drug Promoting Third because "all witnesses testified that [Barona] never touched the pipe, [Barona] never knew that 2 occupants of the car were smoking ice and [Barona] never smoked

ice on the night in question." He argues there was no actual possession because he did not have direct control over the pipe at a given time and there was no constructive possession because he did not have the power and intention at a given time to exercise dominion or control over the pipe directly or through another person or persons.

Hawaii Revised Statutes § 712-1243 states in relevant part:

§712-1243 Promoting a dangerous drug in the third degree. (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

Crystal methamphetamine is a dangerous drug as defined in HRS § 712-1240 (1993) because it is a schedule II drug under HRS § 329-16(e) (2) (Supp. 2004).

Hawai'i courts recognize two types of possession: actual and constructive. Since the pipe was not found in Barona's actual possession, the dispositive issue is whether a reasonable mind might fairly conclude beyond a reasonable doubt that Barona constructively possessed the pipe.

This court in State v. Mundell, 8 Haw. App. 610, 822 P.2d 23 (1991), defined constructive possession as:

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Id. at 617, 822 P.2d at 27 (quoting Black's Law Dictionary 1163 (6th ed. 1990)).^{3/} This court also stated: "To support a finding of constructive possession the evidence must show a sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug. Mere proximity is not enough." Mundell, 8 Haw. App. at 622, 822 P.2d at 29 (internal quotation marks and citations omitted; emphasis added).

This court expounded in State v. Moniz, 92 Hawai'i 472, 992 P.2d 741 (App. 1999), the factors to consider in inferring a nexus between a defendant and the drugs found:

- 1) [T]he defendant's ownership of or right to possession of the place where the controlled substance was found;
- 2) the defendant's sole access to the place where the controlled substance was found;
- 3) defendant under the influence of narcotics when arrested;
- 4) defendant's presence when the search warrant executed;
- 5) the defendant's sole occupancy of the place where the controlled substance was found at the time the contraband is discovered;
- 6) the location of the contraband;
- 7) contraband in plain view;
- 8) defendant's proximity to and the accessibility of the narcotic;
- 9) defendant's possession of other contraband when arrested;
- 10) defendant's incriminating statements when arrested;
- 11) defendant's attempted flight;
- 12) defendant's furtive gestures;
- 13) presence of odor of the contraband;
- 14) presence of other contraband or drug paraphernalia, not included in the charge;
- 15) place drugs found was enclosed.

Other factors that have been deemed relevant include the consistent presence of known narcotics users on the premises; the large quantity of drugs found; the presence of large sums of money; the fact that the defendant had

^{3/} Mundell was overruled by State v. Jenkins, 93 Hawai'i 87, 997 P.2d 13 (2000), but the Hawai'i Supreme Court later clarified in State v. Kupihea, 98 Hawai'i 196, 46 P.3d 498 (2002), that its ruling in Jenkins applied where a defendant was charged with a possession offense under a statute which lacked any specific state of mind element. 98 Hawai'i at 202, 46 P.3d at 504. Here, the statute specifically states that the person must knowingly possess a dangerous drug. Therefore, the overruling by Jenkins does not apply here.

previously sold drugs, or used drugs; and the fact that the drugs were found among the defendant's personal belongings.

Id. at 476, 992 P.2d at 745 (internal quotation marks, citations, ellipses, and brackets omitted; block quote format changed). We also noted that while the factors are helpful in evaluating whether constructive possession exists in certain situations, the factors are more difficult to apply when the defendant does not have exclusive possession or control of the place where the drugs are found and no drugs are found on the defendant's person. Id.

In situations where a defendant does not have exclusive possession or control of the place where drugs are found . . . it is necessary for the State to show facts that would permit a reasonable mind to conclude that the defendant had the intent and capability to exercise control and dominion over the drugs. That is, the evidence must raise a reasonable inference that the defendant was engaged in a criminal enterprise and not simply a bystander. Proof of the defendant's knowledge of the presence of drugs and the defendant's ownership or right to possession of the place where the drugs were found, alone, are insufficient to support a finding of the exercise of dominion and control. Other incriminating circumstances must be present to buttress the inference of knowing possession and provide the necessary link between a defendant and illegal drugs.

Id. at 476-77, 992 P.2d at 745-46 (internal quotation marks, citations, and brackets omitted; emphasis added).

In Moniz, the defendant was convicted of Drug Promoting Third for marijuana recovered from a fishing tool box located in the top drawer of a bedroom dresser that defendant shared with her husband. At trial, her husband accepted sole responsibility for the marijuana found and stated that the tool box was in his dresser drawer where his "shorts and stuff" were located. The defendant testified that she was aware her husband used drugs,

had seen the marijuana in her husband's drawer, and knew it was marijuana. She denied using drugs herself and denied ever touching the drugs. This court concluded that although there was substantial evidence that defendant had the power to exercise control and dominion over the marijuana, there was insufficient evidence that defendant had the necessary intent to exercise control and dominion over the marijuana. Id. at 477, 992 P.2d at 746.

At Barona's trial, the evidence presented by the State consisted of testimony that a glass pipe containing methamphetamine residue was discovered between the center console and driver's seat. The location of the pipe was an inch or two from the driver's leg, about eight inches from the front passenger, and two to three feet from the rear passengers. Officer Hackbarth, who discovered the pipe, explained that he had dusted the pipe for fingerprints and had recovered smudged prints, but not enough to make a clear distinction as to whose prints. He also confirmed on cross-examination that no other person in the vehicle was arrested for the pipe.

Like Moniz, Barona did not have exclusive possession of the place where the drugs were found because there were three passengers in the car, all of whom had access to the area. Similarly, there was sufficient evidence that Barona had the power to exercise control and dominion over the pipe because of

its proximity to his person. However, even assuming that Barona knew the pipe was there, besides Barona's proximity to the pipe, there was no other evidence to support the inference that Barona had the "necessary intent to exercise control and dominion over the [pipe]". Moniz, 92 Hawai'i at 477, 992 P.2d at 746 (emphasis added). As we stated in Mundell, "[m]ere proximity is not enough." Mundell, 8 Haw. App. at 622, 822 P.2d at 29.

Viewing the evidence in the light most favorable to the State and fully recognizing the province of the trier of fact, we hold that a reasonable mind could not fairly conclude beyond a reasonable doubt that Barona constructively possessed the pipe. Accordingly, we reverse Barona's conviction for Promoting a Dangerous Drug in the Third Degree.

IV. CONCLUSION

In light of the foregoing discussion, the Judgment filed on October 13, 2003 in the Circuit Court of the First Circuit is reversed in part and affirmed in part.

DATED: Honolulu, Hawai'i, April 21, 2005.

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Corinne K A Watanabe
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