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NO. 25994

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

STATE OF HAWAI'I, Plaintiff-Appellant, v
JAMES R. WELLING, Defendant-Appellee

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APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 03-1-0004(1))

MEMORANDUM OPINION

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

Plaintiff-Appellant State of Hawai'i (the State) appeals from the Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Suppress Evidence and Statements (Suppression Order) filed on June 27, 2003, in the Circuit Court of the Second Circuit (circuit court).¹ Defendant-Appellee James R. Welling (Welling) was charged by complaint with two counts of Promoting a Dangerous Drug in the Third Degree and two counts of Prohibited Acts Related to Drug Paraphernalia. The Suppression Order precluded the State from introducing evidence on which these charges were based, namely, a glass pipe with residue alleged to be methamphetamine seized by the police from Welling's person and glass pipes with residue alleged to be methamphetamine seized from a truck linked to Welling.

¹ The Honorable Joel E. August presided.

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On appeal, the State argues that the circuit court erred in: 1) preventing the State, at the suppression hearing, from introducing evidence relevant to the assessment of the reliability of an anonymous tip; and 2) ruling that the evidence the court suppressed had been obtained illegally by the police. We affirm.

BACKGROUND

A. Evidence Presented at the Suppression Hearing

On December 26, 2002, at about noon, Maui Police Department (MPD) Officer Nicholas Krau (Officer Krau) was instructed to respond to a residence at a Nohokai Street address to investigate a report from an anonymous male caller. Dispatch advised Officer Krau that the anonymous caller had provided the following information. There were three "local" males at the Nohokai Street residence, one carrying a pistol and the other two carrying rifles, which all appeared to be real weapons. The males were pointing the firearms in the air and yelling. One of the males was a bald-headed man known as "Kenny," who had no shirt and was wearing black shorts. No additional description was provided of the other two males. The three males were partially hidden by a wall and were identified by the caller as known drug dealers.

Officer Krau, the State's sole witness at the suppression hearing, testified that the MPD had received a

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similar anonymous call the night before. In response to the prior call, MPD officers had checked the same Nohokai Street address but did not locate anyone carrying firearms or recover any firearms. Officer Krau recognized the Nohokai Street address because it was a known hangout for drug dealers, drug users, and other types of "shady" people, and Officer Krau had previously arrested several people at that residence. Officer Krau testified that he suspected, based on the description provided by dispatch, that "Kenny" was "Kenneth Yetman," a local Caucasian male who often "hangs out" at the Nohokai Street residence along with Welling. Officer Krau did not believe Welling lived at the Nohokai Street residence.

Officer Krau and his brother, MPD Officer Anthony Krau, arrived at the Nohokai Street address at 12:21 p.m. Officer Krau and his brother entered the property through an open gate then separated to check different areas of the yard. Officer Krau walked around the side of the main residence and saw Welling walking toward him from a structure the officer described as a shed. Officer Krau testified that he knew Welling from previous encounters, which included Officer Krau's arrest of Welling less than a year before for driving without a license. As part of "community relations," Officer Krau would talk to Welling in Kihei when the officer saw Welling. They would approach each other and Officer Krau would ask what Welling was doing. Officer

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Krau suspected that Welling was involved with drugs because he was told by other officers that Welling had been arrested on drug charges in the past. Officer Krau stated that it is not uncommon for people involved with drugs to carry guns. He acknowledged, however, that Welling was not carrying any weapons when Officer Krau previously arrested Welling and that Officer Krau had never known Welling to have a firearm.

When Officer Krau first saw Welling in the yard, Welling was about twenty feet away. Welling was wearing a t-shirt and light-colored shorts and did not match the anonymous caller's description of "Kenny" as a bald-headed male with no shirt and wearing black shorts. Officer Krau, however, testified that he believed that Welling may have been one of the "local" males the caller said were with "Kenny." Welling is Caucasian, was born in Germany, and had lived in Hawaii for twenty-two years. Officer Krau testified that he would describe Welling as "local" because he has dark hair and skin and because Officer Krau considers anyone, regardless of race, who lives in Hawaii and is not a tourist to be "local." Officer Krau also recalled seeing another male on the premises but did not know who the other male was and could not describe him.

Officer Krau kept his hand close to his gun as he approached Welling. They walked toward each other until they were about five feet apart. Officer Krau told Welling that "we

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got a call there's people here with guns." Officer Krau did not see a weapon in Welling's hand but suspected that if Welling was concealing a gun, it might be in the waistband of his surf shorts. Officer Krau testified that he asked Welling "if he would mind lifting up his shirt so I could see that he was not concealing a weapon." In response, Welling lifted his t-shirt. Officer Krau did not find a gun, but tucked in Welling's waistband by the small of his back, Officer Krau found a glass pipe with a white, crystal-like residue. Officer Krau described the pipe as a "crystal meth" pipe and believed that the residue was most likely crystal methamphetamine (commonly known as "ice").

Officer Krau arrested Welling for Promoting a Dangerous Drug in the Third Degree and Prohibited Acts Related to Drug Paraphernalia. Officer Krau advised Welling of his Miranda rights which Welling stated he understood. Officer Krau then asked for and received oral consent from Welling to search a pickup truck parked at the residence which Officer Krau believed belonged to Welling. During Officer Krau's search of the truck, he found a nylon zipper case containing two cracked glass pipes.

Welling testified at the suppression hearing and provided a far different account of his encounter with Officer Krau. Welling testified that he had stayed overnight at the Nohokai Street address in the caretaker's cottage, where Kenny

lived. According to Welling, he had just gotten up and was in the cottage with Kenny, Kenny's girlfriend, and two other men from the main house when Officer Krau arrived. Officer Krau entered the cottage, stated he was looking for guns, asked people in the room if they had guns, drugs, or drug paraphernalia, and searched the cottage.

Welling stated that later, when he was walking outside the caretaker's cottage, he was approached by Officer Krau and two other officers. Officer Krau told Welling to "[h]old it right there," and said the police were looking for a gun. Welling testified that Officer Krau "asked me to lift my shirt." Welling stated that he did not immediately comply, but told Officer Krau that he did not have a gun. Welling testified that Officer Krau asked him again to lift his shirt and "made it as an order." Welling stated he complied by lifting his shirt. Welling testified that after he was arrested, he did not consent to the search of the truck, but instead told Officer Krau that the truck did not belong to Welling.

B. The Circuit Court's Ruling

The circuit court found aspects of the testimony of Officer Krau and Welling "equally absurd." The court noted, however, that

[b]etween the two, quite frankly, for purposes of analysis I think probably Officer Krau, based upon the apparent credibility of the stories and the people is probably a little bit closer to the truth than Mr. Welling's is, but I am not sure that necessarily changes the analysis.

The court orally granted Welling's suppression motion and later filed a written Suppression Order which provided, in relevant part, as follows:

FINDINGS OF FACT

1. On December 26, 2002, at approximately 12:14 p.m., Maui County Police Officer Nicolas Krau received a radio dispatch assignment to investigate an anonymous telephone report of three males carrying firearms in the yard of a private residence located at [a] Nohokai Street [address in], Kihei, Maui, Hawaii.

2. The caller gave a description [sic] one of the three males, known to the caller as "Kenny", as being bald and wearing black shorts and no shirt.

3. Officer Krau testified that he was aware of a similar anonymous call having been received the previous evening and that officers had responded to that call, searched the residence, and located no weapons at that time.

4. Based on the second anonymous telephone report, Officer Krau proceeded shortly thereafter to the Nohokai Street residence.

5. Upon arrival at the subject residence address, Officer Krau did not observe any criminal behavior. Upon entry into the yard, he observed a male known to him as Mr. James Welling, who was simply walking in the yard toward the officer. Mr. Welling did not match the description of "Kenny" given by the anonymous caller, according to the officer.

6. Officer Krau had no articulable reason to believe that Mr. Welling was armed with a weapon based upon his initial perception of the Defendant.

7. Officer Krau, with his hand on his holstered sidearm, stopped Mr. Welling and informed him that he was there to investigate a report of three males carrying weapons. Mr. Welling did not indicate any awareness of this alleged circumstance. Officer Krau then instructed Mr. Welling to raise his tee shirt so that the officer could search him for any weapons, even though no suspicious bulge in his clothing was apparent.

8. There was no evidence that Mr. Welling consented to the encounter or the search of his person.

9. Officer Krau testified that he never informed Mr. Welling that he had a right to choose not to participate in this investigative encounter.

10. When Mr. Welling lifted up his shirt, Officer Krau testified that he then observed what he identified as a methamphetamine pipe tucked into the waistband of Mr. Welling's shorts, at the small of his back.

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11. Officer Krau took possession of the pipe and arrested Mr. Welling.

12. Officer Krau then asked for and gained Mr. Welling's oral consent to search his truck.

13. Officer Krau searched Mr. Welling's truck and seized two glass pipes, drug paraphernalia, and two bottles of pills.

CONCLUSIONS OF LAW

1. Article I, Section 7 of the Hawai'i State Constitution provides that "[T]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated." Warrants based on probable cause are required to validate searches or seizures by government agents. State v. Barrett, 67 Haw. 650, 701 P.2d 1277 (1985). Further, any warrantless search or seizure is presumed to be unreasonable, invalid, and unconstitutional, and the burden always rests with the government to prove that such actions fall within a specifically established and well-delineated exception to the warrant requirement. State v. Ortiz, 67 Haw. 181, 683 P.2d 822 (1984). Under Hawaii law, any properly conducted search or seizure must be no broader than absolutely necessary to satisfy the objective of each exception to the warrant requirement. State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); followed in State v. Perham, 72 Haw. 290, 814 P.2d 914 (1991).

2. A person is seized when a police officer approaches that person with the express or implied purpose of investigating him for some suspected criminal conduct and begins to ask for information. As stated in State v. Kearns, 75 Haw. 558 (1994) at 565, a person is seized, if, given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave.

3. Police officers may briefly detain an individual if they have specific and articulable facts that criminal activity is afoot, and they can engage somebody in an investigative encounter if the person consents to that investigative encounter. Cf. Kearns.

4. When uniformed Officer Krau approached Mr. Welling, he did not observe Mr. Welling engaging in any criminal activity and was aware he was not the individual described by the anonymous caller. Further, Officer Krau did not acquire Mr. Welling's consent for the encounter, nor did he inform Mr. Welling that his contact with him was voluntary, and that he was free to leave if he so desired. Given the totality of the circumstances, a reasonable person in Mr. Welling's position would not have believed that he was free to leave. Therefore, Officer Krau's seizure of Mr. Welling is illegal. Kearns at 574.

5. When Officer Krau ordered Mr. Welling to lift up his shirt to look for weapons he conducted an illegal search incident to an illegal seizure.

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6. Because of the illegal seizure of Mr. Welling's person and the subsequent illegal search of his person, any evidence obtained as a result of the illegal conduct must be suppressed as fruits of the initial illegalities. Wong Sun v. United States, 371 U.S. 471 (1963).

7. After being unconstitutionally seized and searched, such impermissible contact with police cannot be converted into a permissible encounter by later obtaining defendant's consent. Nakamoto v. Fasi, 64 Haw. 17 (1981). Consent, to be valid, must be uncoerced, and when it is clear that a search will be conducted regardless of the consent of the party search, there can be no voluntary waiver of the right to be free from unreasonable searches and seizures. Const.Art. I § 7; U.S.C.A.Const.Amend. 4.

8. Although Officer Krau testified that he obtained Mr. Welling's oral consent to search the truck, such "consent" could not be freely and voluntarily given due to the totality of the circumstances presented herein and was tainted by the prior illegal seizure and search of Mr. Welling's person. As such, the search of the truck by Officer Krau was an unjustifiable search, and the evidence seized thereby must be suppressed as tainted fruits of the poisonous tree.

9. Similarly, any statements that Officer Krau received from Mr. Welling were also tainted by the unconstitutional search and seizure of Mr. Welling, and must be also suppressed.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Suppress Evidence and Statements is granted and all evidence flowing from the illegal acts noted above is precluded from use at any further proceedings in this case.

DISCUSSION

A. Limits Imposed on Officer Krau's Testimony

At the suppression hearing, the Deputy Prosecuting Attorney (DPA) attempted to elicit testimony from Officer Krau that drug dealers and users often use scanners to listen to police transmissions. The DPA explained that the purpose of this testimony was to show why people, in general, may want to remain anonymous. The DPA conceded, however, that Officer Krau had no information about why the particular person who called the police

in this case wanted to remain anonymous. The DPA argued that the proffered testimony was also relevant to show Officer Krau's state of mind as he went to investigate the call. The circuit court sustained Welling's objection to the proffered testimony.

On appeal, the State argues that the circuit court erred in excluding the proffered testimony because it was crucial to establishing the credibility and reliability of the anonymous caller and the reasonableness of Officer Krau's actions. We disagree. The State's proffered evidence, the import of which was that drug dealers monitor police transmissions and that some people may choose to remain anonymous for fear of retaliation, did not serve to explain the motives of the anonymous caller in this case. The State failed to demonstrate any link between the proffered evidence and the anonymous caller. There was no evidence that the anonymous caller indicated his concern that the subjects of his tip used scanners to monitor police transmissions or that the caller declined to disclose his identity due to fear of retaliation. Rather, the DPA conceded that Officer Krau had no information about why the caller in this case wanted to remain anonymous. The proffered evidence excluded by the court was not relevant to the caller's reliability.

We likewise reject the State's argument that the proffered evidence was relevant to establishing the reasonableness of Officer Krau's actions because it supported the

officer's belief that the caller was a neighbor. We fail to see how general evidence that drug traffickers monitor police transmission, which may provide a motive for people who are aware of this practice to call the police anonymously, would tend to show that the caller in this case was a neighbor.

B. The Suppression Order

The State challenges the circuit court's Suppression Order on a number of grounds, which are summarized as follows:

- 1) Prior to Officer Krau's recovery of the glass pipe from Welling's person, Welling had not been seized and therefore the recovery of the pipe was not the fruit of an unlawful seizure.
- 2) Even if Welling had been seized, the seizure was a lawful investigative detention supported by reasonable suspicion.
- 3) The search of Welling's person was not illegal because he voluntarily consented to lifting his shirt in response to Officer Krau's request.
- 4) Even if Welling did not consent to lifting his shirt, Officer Krau's protective search for weapons was lawful because it was supported by reasonable suspicion that Welling was armed and dangerous.
- 5) Because the recovery of the glass pipe from Welling's person was lawful, it did not taint the recovery of the glass pipes from the truck, which were recovered pursuant to Welling's valid consent to search.

A.

We begin our analysis by addressing whether Officer Krau had reasonable suspicion to stop and frisk Welling. If Officer Krau had such reasonable suspicion, the recovery of the glass pipe from Welling's waistband would be lawful. The State argues that the anonymous call was sufficiently corroborated to establish reasonable suspicion to detain Welling and frisk him for weapons. We disagree.

In Florida v. J.L., 529 U.S. 266 (2000), the United States Supreme Court considered the constitutionality of a stop and frisk based on an anonymous tip that a person was carrying a gun. An anonymous caller reported to the police that a young black male wearing a plaid shirt and standing at a particular bus stop was carrying a gun. Id. at 268. The police responded to the bus stop and saw three black males, including respondent J.L., who was wearing a plaid shirt. Id. J.L. did not make any threatening or unusual movements and the police did not see a firearm. Id. An officer told J.L. to put his hands on the bus stop, frisked J.L., and seized a gun from his pocket. Id. The Supreme Court held that the gun was unconstitutionally seized because the anonymous tip was not sufficiently corroborated to provide reasonable suspicion for the stop and frisk. Id. at 271.

The Supreme Court noted that the anonymous call did not provide any predictive information and therefore left the police

without a means to test the informant's knowledge or credibility.

Id. Rather, "[a]ll the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun or supplied any basis for believing he had inside information about J.L." Id. The Court stated that the ability of the police to corroborate details provided by the anonymous caller regarding J.L.'s description was insufficient. Id. at 272. Reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Id.

In State v. Lopes, 63 Haw. 160, 622 P.2d 122 (1981), an anonymous caller reported that a Caucasian male, approximately six feet tall and wearing a yellow shirt, was wielding a gun in the vicinity of the City Inn Bar. The police approached the defendant, who matched this description, frisked him, and recovered a gun from his pocket. Id. at 161, 622 P.2d at 123. The Hawai'i Supreme Court affirmed the trial court's suppression of the gun. The Hawai'i Supreme Court noted that there was nothing about the conduct of the defendant or the attendant circumstances from which the police could have reasonably inferred that the defendant was armed and presently dangerous. Id. Thus, the only possible justification for the stop and frisk was the tip from the anonymous informant. Id. The court concluded that while the tip "might have been grounds for a field

interrogation, it could not supply the basis for an investigative detention . . . or to justify the search of [the defendant's] person." Id. (citations omitted).

Based on J.L. and Lopes, we conclude that the anonymous tip in Welling's case lacked sufficient indicia of reliability to provide reasonable suspicion for an investigative detention or a protective search for weapons. Prior to searching Welling for weapons, Officer Krau had not corroborated any significant detail provided by the anonymous caller. Upon arriving at the Nohokai Street residence, Officer Krau did not see anyone carrying a firearm or yelling. He did not see anyone matching the anonymous caller's description of "Kenny." Welling's conduct was not suspicious. Welling did not make any furtive gestures upon seeing Officer Krau or try to evade the officer. Welling was not carrying a gun in his hands, nor was there any evidence that Officer Krau saw a suspicious bulge under Welling's clothing that suggested Welling was concealing a weapon. Moreover, the failure of MPD officers to find any firearms in response to a similar anonymous tip received the night before provided an additional reason to doubt the reliability of the anonymous tip Officer Krau was pursuing.

The anonymous caller's reference to the three males carrying guns being "known drug dealers" was partially corroborated by the reputation of the Nohokai Street residence as

a "hangout" for drug dealers and users and by Officer Krau's understanding that Welling had been arrested for drug charges in the past. But the caller's reference to known drug dealers was peripheral to the criminal activity alleged in the tip, namely, that three males were walking around carrying guns. Under the circumstances, we conclude that the anonymous tip was not sufficiently corroborated to establish reasonable suspicion for Officer Krau to stop Welling or to search him for weapons.²

B.

We next turn to the State's alternate arguments that prior to Officer Krau's recovery the glass pipe from Welling's waistband, Welling had not been seized and had validly consented to the search of his person. If these arguments are accepted, Officer Krau's recovery of the pipe from Welling was lawful even if Officer Krau lacked reasonable suspicion to detain Welling and search him for weapons. The State contends that because Welling had not been seized and consented to the search of his person, the circuit court erred in ruling that Officer Krau's recovery of

² Plaintiff-Appellant State of Hawai'i (the State), citing State v. Prendergast, 103 Hawai'i 451, 83 P.3d 714 (2004), suggests that the imminence of harm indicated by the anonymous call authorized Officer Nicholas Krau (Officer Krau) to stop and frisk Defendant-Appellee James R. Welling (Welling). In Prendergast, the Hawai'i Supreme Court considered the imminence of harm reflected in an anonymous tip that a person was driving recklessly in holding that an investigative stop of the driver was proper. Id. at 460-61, 83 P.3d at 723-24. We decline to extend the imminence-of-harm rationale to authorize a stop and frisk in Welling's case. In Florida v. J.L., 529 U.S. 266, 272 (2000), the United States Supreme Court rejected the claim that the standard analysis under Terry v. Ohio, 392 U.S. 1 (1968), should be modified by creating an automatic firearm exception, which would always allow the police to stop and frisk a person based on a tip alleging an illegal gun.

the glass pipe was based on "an illegal search incident to an illegal seizure."

We need not address whether the brief interaction between Officer Krau and Welling prior to the recovery of the glass pipe constituted a seizure rather than a consensual encounter. This is because we affirm the circuit court's suppression order on the ground that the circuit court did not err in ruling that the pipe was obtained from Welling's waistband as the result of an illegal search.

Welling had a reasonable expectation of privacy in the portions of his body concealed by his shirt and, therefore, having him lift his shirt was a search. See United States v. Baker, 78 F.3d 135, 137 (4th Cir. 1996) (characterizing the defendant's lifting of his shirt in response to a police officer's order as a "protective search"). The State, however, argues that the search of Welling was lawful because he voluntarily consented to the search. In State v. Patterson, 58 Haw. 462, 468-69, 571 P.2d 745, 749 (1977), the Hawai'i Supreme Court set forth the standard of review applicable to rulings on the validity of a defendant's consent to search:

It is well-settled that when the prosecution seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving by the preponderance of the evidence that the consent was, in fact, freely and voluntarily given. . . . [W]hether consent to search has been given voluntarily is a question of fact to be determined by the trial court from the "totality of all the circumstances." Considerable deference must be given in this regard to the findings of the trier of fact, who is best situated to decide the question of voluntariness . . . The power to judge credibility of witnesses, resolve conflicts in

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testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings whether express or implied must be upheld if supported by substantial evidence.

The role of the reviewing court on this issue is thus quite limited. We adopt the view of the majority of courts and hold that the findings of a trier of fact regarding the validity of consent to search must be upheld unless "clearly erroneous."

(Citations and certain quotation marks omitted.)

On the issue of consent, the circuit court made the following relevant findings of fact:

7. Officer Krau, with his hand on his holstered sidearm, stopped Mr. Welling and informed him that he was there to investigate a report of three males carrying weapons. . . . Officer Krau then instructed Mr. Welling to raise his tee shirt so that the officer could search him for any weapons, even though no suspicious bulge in his clothing was apparent.

8. There was no evidence that Mr. Welling consented to the encounter or the search of his person.

Based on these factual findings, the Court concluded that "[w]hen Officer Krau ordered Mr. Welling to lift up his shirt to look for weapons, he conducted an illegal search" By finding that Officer Krau "instructed" and "ordered" Welling to lift his shirt and that there was "no evidence" of Welling's consent, the circuit court implicitly found that Welling had not voluntarily consented to the search of his person. This implicit finding was not clearly erroneous.

Welling testified that Officer Krau asked Welling to lift his shirt, and when Welling did not immediately comply,

Officer Krau repeated the request and "made it as an order."³ We conclude that the circuit court did not clearly err in finding that Officer Krau "instructed" or "ordered" Welling to lift his shirt. There was substantial evidence to support the circuit court's implicit finding that the Welling did not voluntarily consent to the search of his person.

C.

Because the search of Welling was illegal, the circuit court properly suppressed the glass pipe recovered from Welling's waistband. The subsequent recovery of the glass pipes from the truck was the direct result of the illegal search of Welling's person. Under the "fruit of the poisonous tree" doctrine, the prosecution is precluded from using evidence at trial "which comes to light as a result of the exploitation of a previous illegal act of the police." State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997); Wong Sun v. United States, 371 U.S. 471, 484-84 (1963). We conclude that the circuit court properly

³ In his brief, Welling states that the trial court found Officer Krau's testimony more credible than Welling's testimony and based its suppression ruling "entirely on Krau's testimony." Welling therefore states that "Welling's testimony is not material to the consideration of the instant appeal." We do not agree with Welling's position. After noting at the suppression hearing that aspects of Officer Krau's and Welling's testimony were "equally absurd," the trial court stated that "for purposes of analysis I think probably Officer Krau . . . is probably a little bit closer to the truth than Mr. Welling is" We do not believe that by these suppression-hearing remarks, the trial court disclaimed reliance on any aspect of Welling's testimony or that the trial court was precluded from relying on Welling's testimony in making certain factual findings. We therefore consider Welling's testimony in determining whether the trial court clearly erred in finding that Officer Krau "instructed" or "ordered" Welling to lift his shirt.

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suppressed the glass pipes recovered from the truck as the tainted fruit of the illegal search of Welling's person.

CONCLUSION

We affirm the Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Suppress Evidence and Statements filed on June 27, 2003, in the Circuit Court of the Second Circuit.

DATED: Honolulu, Hawai'i, December 30 , 2005.

On the briefs:

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