

NOT FOR PUBLICATION

NO. 25563

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
CARL I. NOHA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 01-1-177)

MEMORANDUM OPINION

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

Defendant-Appellant Carl Noha (Noha) appeals from the Judgment filed on November 14, 2002, in the Circuit Court of the Third Circuit (circuit court).¹ Noha was charged with two counts of Place to Keep a Loaded Firearm, in violation of Hawaii Revised Statutes (HRS) § 134-6(d) (Supp. 2004),² for carrying firearms loaded with ammunition in his vehicle. Count 1 charged him with carrying a loaded .38 caliber handgun and Count 2 with carrying a loaded .22 caliber handgun.

¹ The Honorable Riki May Amano presided.

² Hawaii Revised Statutes (HRS) § 134-6(d) (Supp. 2004) provides in relevant part:

(d) It shall be unlawful for any person on any public highway . . . to carry in a vehicle any firearm loaded with ammunition; provided that this subsection shall not apply to any person who has in the person's possession or carries a pistol or revolver and ammunition therefor in accordance with a license issued as provided in section 134-9.

HRS § 134-9 (Supp. 2004), in turn, provides that the chief of police of the appropriate county may grant a person a license to carry a pistol or revolver and ammunition therefor.

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Prior to trial, Noha filed a motion to suppress the evidence recovered from his vehicle, which included the handguns described in Counts 1 and 2 and related ammunition. The circuit court orally denied Noha's suppression motion before trial and later filed a written "Order Denying Defendant's Motion to Suppress Evidence" (Suppression Order) on November 23, 2001. After a jury trial, Noha was found guilty of Count 1 and acquitted of Count 2. He was sentenced to a five-year term of probation, a 90-day term of imprisonment that was stayed as long as he complied with the conditions of probation, a \$150 fine, and \$200 in fees.

On appeal, Noha argues that: 1) the circuit court erred in failing to suppress all evidence seized from Noha's car after the .22 caliber firearm was recovered; 2) the circuit court erred in admitting evidence that the .38 caliber handgun had been test-fired and that the .38 caliber and .22 caliber handguns were capable of discharging ammunition; and 3) the circuit court's instructions to the jury relating to ammunition were erroneous and Noha's trial counsel provided ineffective assistance in agreeing to the erroneous instructions. For the reasons set forth below, we affirm the circuit court's Suppression Order, but vacate the Judgment and remand the case for a new trial consistent with this opinion.

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BACKGROUND

In the morning on Easter Sunday, 2001, Joseph Pinc (Pinc) and his wife drove in their van to an area known as Coral Flats in Kawaihae Harbor. They parked their van about 200 feet from another vehicle. Pinc got out of the van and heard Noha yelling and screaming in the distance. As Pinc moved away from his van, he heard Noha yell, "You fuckin' haole, go back to where you came from." Pinc believed that Noha was talking to him because there was no one else there.

Pinc returned to his van and sat in the driver's seat. A few minutes later, Noha walked toward Pinc, carrying what Pinc believed was a gun wrapped in a blue plastic bag. The plastic bag was semi-transparent and was wrapped tightly around the gun. Noha walked past Pinc to the back of the van. Noha then walked back to the driver's side of the van and told Pinc, "You'd better get outta here." Pinc started up the van and drove directly to a 7-Eleven, where he called the police.

Hawaii County Police Department (HCPD) Officer Floyd Richards (Officer Richards) responded to Pinc's call. Pinc told Officer Richards what had happened and described Noha as an elderly³ Japanese man, wearing a tan-colored hat, and driving a small four-door Mazda or Nissan. A short time later, Officer

³ Defendant-Appellant Carl Noha (Noha) was 74 years old at the time of the charged offenses.

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Richards saw Noha, who matched the description provided by Pinc, driving a 4-door Mazda car on Kawaihae Road. Officer Richards stopped Noha's car after Noha turned into Kawaihae Harbor.

After Officer Richards explained the reason for the stop, Noha stated that he had a permit for the gun. Officer Richards had Noha step out of the car. Pointing to the driver's seat, Noha told Officer Richards that the gun was "right here" and asked if the officer wanted to see it. When Officer Richards asked Noha to sign a written consent to search the car, however, Noha refused. Officer Richards arrested Noha. Pinc was brought to the scene and identified Noha as the man Pinc had previously encountered. Noha was transported to the Waimea police station. While there, Noha indicated that he carries a gun for protection.

DISCUSSION

I. Search Warrant

HCPD Detective Gilbert Gaspar (Detective Gaspar) prepared an affidavit, which incorporated the basic facts described above, in support of a warrant to search Noha's car. The warrant was issued and authorized a search for:

1. Handgun, unknown make and model;
2. Ammunition to include spent cartridges;
3. Blue plastic bag; [and]
4. Articles of property tending to establish the identity of person(s) in control of the vehicle being searched to include but not limited to vehicle registration, safety check, insurance cards, driver's license, receipts, addressed envelopes, keys, address books, and photographs[.]

In executing the search warrant, Detective Gaspar first found a blue plastic bag containing a loaded .22 caliber pistol on the back seat floor. He next found a loaded .38 caliber revolver in another blue plastic bag in the same area. Detective Gaspar continued his search and recovered numerous rounds of .22 and .38 caliber ammunition from the trunk. He also recovered envelopes addressed to Noha from the glove compartment.

The circuit court filed its Suppression Order denying Noha's motion to suppress the evidence recovered during the search of his car on November 23, 2001. On appeal, Noha argues that the circuit court erred in refusing to suppress the evidence recovered after Detective Gaspar's initial discovery of the loaded .22 caliber pistol in the blue plastic bag. Noha contends that Detective Gaspar should have stopped his search after the discovery of the .22 caliber pistol in the bag because the search warrant only authorized the search for a single handgun of unknown make and model and a single blue plastic bag. Under Noha's theory, the seizure of the other evidence, including the loaded .38 caliber revolver, exceeded the scope of the warrant and should have been suppressed. We disagree.

The warrant authorized a search for a handgun of "unknown" make and model. Detective Gaspar's initial seizure of the .22 caliber pistol did not mean that he had found the handgun identified in the warrant. Thus, the discovery of the .22

caliber pistol did not terminate Detective Gaspar's authority to search for a handgun. More importantly, the warrant also authorized the search for ammunition and identifying documents. Detective Gaspar was justified in continuing his search for these items even after recovering the .22 caliber pistol in the blue bag. The loaded .38 caliber pistol was found during the course of Detective Gaspar's continued search for ammunition and identifying documents.

We reject Noha's claims that the continued search for ammunition and identifying documents was improper. Noha argues that there was no probable cause to search for ammunition because the supporting affidavit did not refer to Pinc observing any ammunition or reporting that Noha had discharged a firearm. As the circuit court found, the information in the affidavit relating to Noha's possession of a firearm provided sufficient probable cause to search for ammunition. We likewise find without merit Noha's argument that the search for identifying documents was impermissible because the police already knew through other sources that Noha owned the vehicle. Noha cites no authority for the proposition that the police are precluded from searching for evidence that could be proved by other sources. Under Hawai'i Rules of Penal Procedure (HRPP) Rule 41(b), a warrant may be issued to search for and seize any "property that constitutes evidence of the commission of an offense." Documents

that would tend to identify Noha as the person in control of the vehicle would link Noha to any firearms found in the car and thus constituted "evidence of the commission of an offense."

II. Evidence That the .38 Revolver Was Capable of Being Fired

A.

On October 4, 2001, the circuit court, without any objection from the State of Hawai'i (the State), orally granted Noha's motion in limine to prohibit the State from introducing evidence not disclosed prior to October 1, 2001.⁴ On October 8, 2001, HCPD Detective Wayne Young (Detective Young) successfully test-fired the .38 caliber revolver, using a plastic bullet. On October 9, 2001, the Deputy Prosecuting Attorney (DPA) notified Noha's counsel of the test-firing. On October 15, 2001, Noha submitted supplemental jury instructions which stated that the prosecution was required to prove that the "firearm involved was capable of discharging loaded ammunition."

On October 16, 2001, after opening statements but before any witness had been called, the DPA notified the circuit court that he planned to call Detective Young to testify about the test-firing of the .38 caliber revolver. The DPA also stated that he planned to call Detective Gaspar to render an opinion

⁴ The October 4, 2001, oral ruling of the Circuit Court of the Third Circuit (circuit court) was later included in a written order filed on October 19, 2001, which stated, in relevant part, that "the State is prohibited from introducing evidence disclosed after October 1, 2001."

that .38 caliber revolver and .22 caliber pistol were capable of discharging ammunition based on his examination of the guns. Over Noha's objection, the circuit court ruled that it would permit the State to call Detectives Young and Gaspar. The circuit court advised Noha's counsel that it would consider granting Noha a continuance if counsel needed more time to prepare for cross-examination or secure his own expert. Noha's counsel did not request a continuance at any time during the subsequent trial proceedings.

At trial, Detective Young testified that he test-fired the .38 caliber revolver recovered from Noha's car. Detective Young stated that at first, he did not want to test-fire the .38 caliber revolver because the gun was rusty and did not appear to be well-maintained. Detective Young was concerned that using a fully-loaded .38 caliber round to test-fire the gun would be dangerous. Accordingly, he used a plastic bullet that did not have a full charge to test-fire the gun. The .38 caliber revolver functioned properly in discharging the plastic bullet. Detective Young testified that the plastic bullet he used qualified as ammunition and opined that the .38 caliber revolver was "capable of discharging ammunition."

Detective Young did not test-fire the .22 caliber pistol recovered from Noha's car, which also appeared to be rusty and poorly maintained. Detective Young explained that he did not

have access to lower-powered .22 caliber ammunition and was afraid that the .22 pistol might explode in his hand if he used regular .22 caliber ammunition.

Detective Gaspar did not test fire either gun. Detective Gaspar testified the he examined both the .38 caliber revolver and the .22 caliber pistol after he recovered them from Noha's car. He stated that the necessary components for both guns appeared to be intact and opined that both guns were capable of firing ammunition.

On appeal, Noha argues that the circuit court erred in permitting the State to call Detectives Young and Gaspar to testify about whether the firearms were capable of discharging ammunition because 1) the State violated the deadline for disclosure of evidence established by the circuit court and 2) the State only decided to call the detectives after Noha's proposed jury instructions had revealed the need to prove the firearms were capable of being fired. We disagree.

The trial court had the discretion to reconsider and grant an exception to its order prohibiting the introduction of evidence not disclosed before the pretrial deadline. See State v. Young, 29 P.3d 949, 956 (Idaho 2001); Lussier v. Mau-Van Development, Inc., 4 Haw. App. 359, 393, 667 P.2d 804, 826 (1983). In order to alleviate any prejudice resulting from the State's late disclosure, the circuit court invited Noha's counsel

to request a continuance if counsel felt one was necessary. Noha's counsel, however, did not ask for a continuance. We conclude that the trial court did not abuse its discretion in reconsidering its disclosure order and permitting the State to call Detectives Young and Gaspar.

Noha cites State v. Kwak, 80 Hawai'i 297, 909 P.2d 1112 (1995), in support of his argument that the circuit court improperly "took on the role of an advocate" in allowing Detectives Young and Gaspar to testify that the firearms were capable of firing ammunition. In Kwak, the trial court permitted the prosecution to re-open its case to introduce evidence establishing venue after the prosecution had rested and the defense had moved for judgment of acquittal because venue had not been proved. Id. at 304; 909 P.2d at 1119. The Hawai'i Supreme Court held that the trial court abused its discretion in ignoring its "mandatory obligation under HRPP 29⁵ . . . to grant [the defendant] the acquittal to which he was entitled," and, instead, had "assume[d] the role of an advocate for the prosecution in

⁵ Hawaii Rules of Penal Procedure (HRPP) Rule 29 provides in relevant part:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses alleged in the charge after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

(Emphasis added).

permitting it to reopen its case." Id. at 303, 909 P.2d at 1120 (internal quotation marks omitted).

Kwak is clearly distinguishable. Unlike in Kwak, the State in Noha's case had not even called its first witness, much less rested its case. Accordingly, the circuit court's decision was not circumscribed by the mandatory requirements of HRPP Rule 29, and the court did not act improperly in permitting Detectives Young and Gaspar to testify.

B.

Noha also argues that the trial court erred in permitting Detectives Young and Gaspar to testify as experts under HRE Rule 702. Because Noha was acquitted of the count involving the .22 caliber pistol, his claim that the trial court erroneously admitted expert testimony regarding that gun is moot. Accordingly, we focus on the testimony concerning whether the .38 caliber revolver was capable of discharging ammunition.

The evidence that was critical to determining whether the .38 caliber revolver was capable of discharging ammunition was Detective Young's testimony that he successfully test-fired the revolver. That testimony, however, was admissible even if Detective Young did not qualify as an firearms expert. A lay witness can testify based on personal knowledge that he or she pulled the trigger of a gun and that the gun successfully discharged a bullet. See State v. Irebaria, 55 Haw. 353, 359,

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519 P.2d 1246, 1250 (1974) (concluding that a witness's testimony that the gun was fired during a robbery provided sufficient evidence to prove that the gun was operable).

We need not address whether the circuit court erred in allowing Detectives Young and Gaspar to testify as experts under HRE Rule 702 that the .38 caliber revolver was capable of discharging ammunition.⁶ As noted, the key aspect of Detective Young's testimony -- that he successfully test-fired the .38 caliber revolver -- was admissible as lay-witness testimony. Detective Young's opinion that the .38 caliber revolver was capable of discharging ammunition was based on his successful test-firing. Detective Gaspar's matching opinion, which was merely based on his examination of the revolver, added very little to the prosecution's evidence. Under these circumstances, we conclude that any error in the circuit court's permitting Detectives Young and Gaspar to testify as firearms experts was harmless beyond a reasonable doubt. HRPP Rule 52(a).

⁶ The following evidence regarding the qualifications of Detective Wayne Young (Detective Young) and Detective Gilbert Gaspar (Detective Gaspar) were elicited during their testimony at a Hawaii Rules of Evidence (HRE) Rule 104 hearing and their testimony at trial. Detective Young stated that he had been with the Hawaii County Police Department (HCPD) for fourteen years; that he had undergone the basic firearms training all police officers receive; that he had been trained in the use of a .38 caliber revolver, which at one time was the type of gun issued to police officers, and was familiar with its use and how it functioned; that he was currently a certified firearms instructor; and that he had previously test-fired firearms. Detective Young acknowledged, however, that he was unfamiliar with the procedures used by the HCPD or the Honolulu Police Department crime laboratories to test-fire firearms. He also was not sure whether he had previously been called as a witness to testify about his test-firing of guns. Detective Gaspar testified that he was trained in the functioning, use, and maintenance of guns in his recruit class and had recovered approximately 25 guns in his career.

III. Jury Instructions

Noha was charged with violating HRS § 134-6(d), which provides in relevant part that "[i]t shall be unlawful for any person on any public highway . . . to carry in a vehicle any firearm loaded with ammunition" The bullets found in the .38 caliber revolver were not test-fired. Noha argued in the court below that HRS § 134-6(d) required the State to prove not only that the .38 caliber revolver was loaded with ammunition, but that the ammunition itself was "loaded" in that the ammunition was live or capable of being fired. Noha's interpretation of HRS § 134-6(d) was based on State v. Irebaria, 55 Haw. at 353, 519 P.2d at 1246, in which the Hawai'i Supreme Court construed a related statute, HRS § 134-7, which prohibited a felon from owning, possessing or controlling "any firearm or ammunition therefor." Our Supreme Court stated that the prosecution "must prove as essential elements of its case that the weapons involved in this case were capable of discharging loaded ammunition or that the ammunition was actually loaded." Id. at 357-58; 519 P.2d at 1249-50 (emphasis added).

One of Noha's main defenses was that because the State had not introduced evidence that the bullets inside the .38 caliber revolver had been test-fired, it had failed to prove, as required by HRS § 134-6(d), that these bullets constituted ammunition that was "actually loaded." In support of this

defense, Noha submitted the following proposed jury instruction on the elements required to prove the HRS § 134-6(d) offense:

In order to find Defendant guilty of Count 1 of the Complaint, Loaded Firearm on a Public Highway, the prosecution must prove beyond a reasonable doubt that:

1. The firearm involved was capable of discharging loaded ammunition; and
2. The ammunitions [sic] in the firearm were actually loaded with explosives.

The circuit court modified paragraph 2 of the proposed elements instruction to read:

2. The firearm was actually loaded with ammunition.

Noha objected to the court's modification, arguing that the modified elements instruction failed to capture the crucial requirement under Irebaria that the "ammunition was actually loaded."

The circuit court overruled Noha's objection to the modified elements instruction, but offered to give an additional instruction on the definition of "ammunition" based on the Random House dictionary, 1996 special second edition. The court gave Noha's counsel the option of choosing from the following two definitions of ammunition: 1) "the means of igniting or exploding such material as primers, fuzes, f-u-z-e-s, and gunpowder;" or 2) "the material fired, scattered, dropped, or detonated from any weapon as bombs or rockets and especially

shot, shrapnel, bullets or shells fired by guns."⁷ Noha's counsel chose the first definition, stating he "would have no objection" to that definition. The court gave both the modified elements instruction, to which Noha objected, and the agreed-upon instruction on the dictionary definition of ammunition.

On appeal, Noha argues that the instructions given by the court were erroneous because they failed to convey the critical requirement that the ammunition itself was capable of being fired. He contends that his trial counsel was ineffective in eventually "agreeing" to the modifications suggested by the circuit court. Based on our review of the record, we do not regard trial counsel's agreement to the additional instruction defining ammunition as an abandonment of his objection to the court's modification of the elements instruction. Accordingly, we view the relevant issue as whether the circuit court erred in giving the modified elements instruction over Noha's objection.

HRS Chapter 134 does not define the term "ammunition." The term "ammunition" as used in HRS § 134-7, the felon in possession statute, has been construed as requiring proof that

⁷ In presenting these options to Noha's counsel, the circuit court read from the Random House dictionary, but did not read the definitions in the order set forth in the dictionary. The Random House dictionary used by the trial court defines "ammunition" in relevant part as follows:

am-mu-ni-tion . . . 1. the material fired, scattered, dropped, or detonated from any weapon, as bombs or rockets, and esp. shot, shrapnel, bullets, or shells fired by guns. 2. the means of igniting or exploding such material, as primers, fuzes, and gunpowder.

the ammunition "was actually loaded," in other words, capable of being discharged. Irebaria, 55 Haw. at 358, 519 P.2d at 1249; State v. Gray, 108 Hawai'i 124, 132, 117 P.3d 856, 864 (App. 2005). We see no reason why the term "ammunition" should carry a different meaning when used in the related Place to Keep a Loaded Firearms statute, HRS § 134-6(d). See HRS § 1-16 (1993) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other.")

We conclude that the modified elements instruction given by the court did not adequately convey the requirement that the ammunition found within the .38 caliber revolver must have been capable of being discharged. The modified elements instruction only required proof that the firearm was capable of discharging loaded ammunition and that the firearm was loaded with ammunition; it did not require that the ammunition was loaded or capable of being discharged. Nor did the court's definition of ammunition cure this deficiency. Instead, it simply added a level of confusion by ambiguously defining ammunition as "the means of exploding such material, as primers, fuzes, and gunpowder." This definition did not explain what was meant by "such material" or tie the "means of exploding" to any projectile.

Noha's "ammunition" defense was centered on his claim that the State had failed to prove that the .38 caliber

ammunition found in the revolver was capable of being fired. The .38 caliber ammunition had not been test-fired. Detectives Young and Gaspar testified that ammunition would not fire if the primer was defective and that the only way to know if ammunition actually worked was to test-fire it. The jury also acquitted Noha of the count involving the .22 caliber pistol, which had not been test fired. Under these circumstances, we conclude that the circuit court's erroneous jury instructions were not harmless beyond a reasonable doubt. State v. Valentine, 93 Hawai'i 199, 204, 998 P.2d 479, 484 (2000).

B.

Even though the .38 caliber ammunition in the revolver was not test-fired, there was sufficient evidence from which the jury could have found that the ammunition was capable of being discharged. Detective Gaspar identified the bullets found within the .38 caliber revolver as "ammunition" and the bullets were admitted in evidence. "[I]n the absence of evidence that the ammunition was not loaded or was not capable of being fired," the jury could reasonably infer that the ammunition "was loaded and capable; in other words, that it was 'actually loaded.'" Gray, 108 Hawai'i at 133, 117 P.3d at 865 (internal citation and certain brackets omitted). There was also sufficient evidence to prove the other elements of the Place to Keep a Loaded Firearm offense charged in Count 1. Thus, while Noha is entitled to have

his conviction on Count 1 vacated, the State is entitled to retry him on that charge.

CONCLUSION

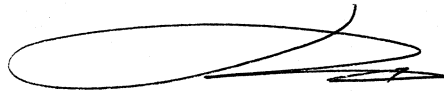
We affirm the "Order Denying Defendant's Motion to Suppress Evidence" filed by the Circuit Court of the Third Circuit on November 23, 2001. We vacate the Judgment filed on November 14, 2002, and remand the case for a new trial consistent with this opinion on Count 1.

DATED: Honolulu, Hawaii, January 19, 2006.

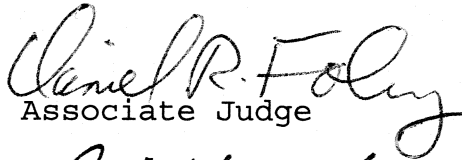
On the briefs:

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Acting Chief Judge



Associate Judge



Associate Judge