

NO. 26867

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
JAY JEFFREY WERNER,
also known as Jay Werner and Jeffrey Werner,
Defendant-Appellant,
and
JACQUELINE E. BISSEN,
Defendant.

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2006 DEC -4 AM 10:15

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-2837)

MEMORANDUM OPINION

(By: Watanabe, Presiding Judge, Lim, and Nakamura, JJ.)

Defendant-Appellant Jay Jeffrey Werner (Werner) appeals from the Judgment entered on September 3, 2004, in the Circuit Court of the First Circuit (circuit court). Werner was charged by complaint with: 1) Promoting a Dangerous Drug in the First Degree for knowingly possessing at least one ounce of a substance containing methamphetamine, in violation of Hawaii Revised Statutes (HRS) Section 712-1241(1)(a)(i) (Supp. 2002)¹ (Count 1);

¹ Hawaii Revised Statutes (HRS) § 712-1241(1)(a)(i) (Supp. 2002) provides:

- (1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:
- (a) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:

2) Unlawful Use of Drug Paraphernalia, in violation of HRS Section 329-43.5(a) (1993)² (Count 2); and 3) Promoting a Detrimental Drug in the Third Degree for knowingly possessing marijuana, in violation of 712-1249 (1993)³ (Count 3).⁴ A jury found Werner guilty as charged on all counts. Werner was sentenced to concurrent terms of imprisonment of twenty years on Count 1, five years on Count 2, and thirty days on Count 3. He was further sentenced as a repeat offender to a mandatory minimum term of six years and eight months of imprisonment on Count 1.

Werner's prosecution was based on evidence recovered during the execution of a search warrant. The affidavit in support of the warrant referred to the observations and activities of a confidential informant (CI). The State of Hawai'i (the State) provided Werner with a redacted version of the affidavit in discovery.

-
- (i) One ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers[.]

² HRS § 329-43.5(a) (1993) provides, in relevant part:

(a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

³ HRS § 712-1249 (1993) provides, in relevant part:

(1) A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana . . . in any amount.

⁴ The complaint also charged co-defendant Jacqueline E. Bissen (Bissen) with the same offenses as Defendant-Appellant Jay Jeffrey Werner (Werner) but in different counts. Bissen pleaded no contest to the charges against her. She did not appeal her convictions or sentences.

On appeal, Werner argues that the redacted affidavit did not provide him with sufficient information to challenge the existence of probable cause for the warrant, including whether the information provided by the CI was stale. He therefore contends that the circuit court erred in denying his September 2, 2003, Motion to Compel Discovery.

We hold, pursuant to State v. Kapiko, 88 Hawai'i 396, 404, 967 P.2d 228, 236 (1998), that the circuit court erred in failing to order the State to provide Werner with a range of dates within which the observations and activities of the CI occurred. We remand for further proceedings consistent with this opinion.⁵

BACKGROUND

On December 18, 2002, the police executed a search warrant (SW 2002-269) on Werner's residence. During the search, the police discovered incriminating drug evidence which led to the arrests of Werner and his co-defendant Jacqueline E. Bissen (Bissen). The affidavit of Honolulu Police Department (HPD) Detective Dwight Sato (Detective Sato), which was submitted in support of the search warrant, referred to the observations and activities of a CI. The State moved for a protective order to seal Detective Sato's affidavit in order to ensure the confidentiality of the CI's identity and the ongoing

⁵ On November 1, 2006, this court issued an order directing the parties to supplement the record on appeal with a copy of the redacted affidavit at issue in this appeal. On November 28, 2006, a Second Supplemental Record of Appeal was filed which reflects the inclusion of the redacted affidavit as part of the record on appeal.

investigation. The District Court of the First Circuit granted the State's motion and sealed the affidavit.

On March 4, 2003, Werner filed a Motion to Compel Discovery, or in the Alternative, Motion to Dismiss Complaint with Prejudice (First Motion to Compel Discovery). The First Motion to Compel Discovery requested disclosure of: 1) a copy of Detective Sato's affidavit, including all attachments, and 2) the names, addresses, and telephone numbers of all persons who provided information to the HPD in support of the search warrant. In its memorandum in opposition to the First Motion to Compel Discovery, the State argued that the requested information was not relevant to a determination of Werner's guilt or innocence. It also argued that the disclosure of Detective Sato's affidavit would enable Werner to ascertain the CI's identity, placing the CI's safety and future investigations in jeopardy. The State asserted that the CI's identity was privileged and protected from disclosure under Hawaii Rules of Evidence (HRE) Rule 510 (1993)⁶

⁶ Hawaii Rules of Evidence (HRE) Rule 510 (1993) provides, in relevant part:

Rule 510 Identity of informer. (a) Rule of privilege. The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

.

(c) Exceptions.

.

(2) Testimony on merits. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of

and Hawai'i Rules of Penal Procedure (HRPP) Rule 16(e)(5)(ii) (2006).⁷

On May 9, 2003, the circuit court issued an order denying Werner's First Motion to Compel Discovery. The court

a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government. All counsel and parties shall be permitted to be present at every stage of proceedings under this paragraph except a showing in camera, at which no counsel or party shall be permitted to be present.

- (3) Legality of obtaining evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable and credible, the judge may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this paragraph except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

⁷ Hawai'i Rules of Penal Procedure (HRPP) Rule 16(e)(5)(ii) (2006) provides:

(ii) *Informants*. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the defendant. Disclosure shall not be denied hereunder of the identity of a witness intended to be produced at a hearing or trial.

made the following findings of fact:

1. [T]he confidential informant (hereinafter "CI") used by the Honolulu Police Department to obtain [the] search warrant . . . was not present at the execution of the warrant on December 18, 2002 and [was] not a participant in the offenses charged.

2. . . . [T]he testimony of the CI is not necessary for the determination of guilt or innocence in the instant matter.

3. . . . [B]oth Hawaii Rules of Penal Procedure (hereinafter "HRPP") and Hawaii Rules of Evidence (hereinafter "HRE") entitles the prosecution to protect the identity of the CI.

In its conclusions of law, the court cited State v. Davenport, 55 Haw. 90, 516 P.2d 65 (1973), for the proposition that the CI's identity need not be disclosed when the CI is not involved in the crime charged, because the CI's testimony is not crucial to the issue of guilt. The circuit court also cited HRE Rule 510 and HRPP Rule 16(e)(5)(ii) in support of its decision.

On May 20, 2003, Werner filed a Motion for Reconsideration of Order Denying Motion to Compel (Second Motion to Compel Discovery). Werner emphasized that he was not seeking to obtain the identity of the CI, but rather was interested in learning the information relied upon to establish probable cause for the warrant. Werner contended that without the specific information contained in Detective Sato's affidavit, he could not challenge the validity of the search warrant, fashion a defense, and prepare for trial.

The circuit court granted the Second Motion to Compel Discovery. It ordered the State to disclose Detective Sato's affidavit and all attachments to Werner but permitted the State to redact "any information contained in Detective Sato's Affidavit and the attachments that may identify the confidential

informant."

The State disclosed a redacted version of Detective Sato's affidavit to Werner. In response, Werner filed another Motion to Compel Discovery on September 2, 2003 (Third Motion to Compel Discovery). Werner argued that the redacted affidavit did not contain sufficient information to permit him to determine whether there was probable cause for the warrant. In particular, Werner contended that he lacked information regarding why Werner was the target of the search warrant, the time frames to determine staleness, and the reliability of the CI. Werner repeated his assertion that without the specific information in Detective Sato's affidavit, he was not able to challenge the validity of the search warrant, to fashion a defense, and prepare for trial.

At a September 9, 2003, hearing on the Third Motion to Compel Discovery, Werner stated that the redacted affidavit appears to indicate that the CI made one or more controlled purchases of drugs. The affidavit as redacted, however, contained no reference to any dates regarding the CI's activities or observations. The parties discussed at the hearing whether the prosecution would be willing to provide Werner with a range of dates for the CI's activities and observations, without revealing the exact dates. The hearing was concluded without that issue being resolved. The State concedes in its answering brief that it never disclosed to Werner a range of dates for the CI's activities and observations.

After the hearing, the circuit court reviewed, *in camera*, Detective Sato's unredacted affidavit and attachments. On February 2, 2004, the circuit court issued its Order Regarding *In Camera* Review of Affidavit in Support of the Search Warrant and Attachments (Order Regarding *In Camera* Review), which noted the court's receipt of Detective Sato's affidavit and attachments for *in camera* review. The Order Regarding *In Camera* Review contained the following findings: "1) the information contained in the documents presents a sufficient basis for a determination of probable cause for the search warrant; and 2) there is no evidence of staleness[.]" The Order Regarding *In Camera* Review did not specifically rule on the Third Motion to Compel Discovery, but it implicitly denied that motion.⁸ Werner proceeded to trial and the jury found him guilty as charged on all counts.

DISCUSSION

The circuit court correctly determined that the identity of the CI was privileged and that the State was entitled to protect the CI's identity pursuant to HRE Rule 510 and HRPP Rule 16(e)(5)(ii). Kapiko, 88 Hawai'i at 401-04, 967 P.2d at 233-36 (1998). The State informed the circuit court that the charges against Werner were based on evidence uncovered during

⁸ The Honorable Wilfred Watanabe presided over Werner's March 4, 2003, Motion to Compel Discovery, or in the Alternative, Motion to Dismiss Complaint with Prejudice and Werner's May 20, 2003, Motion for Reconsideration of Order Denying Motion to Compel. The Honorable Derrick H.M. Chan presided over Werner's September 2, 2003, Motion to Compel Discovery, issued the February 2, 2004, Order Regarding *In Camera* Review of Affidavit in Support of the Search Warrant and Attachments, and presided over Werner's trial and sentencing.

the execution of the search warrant, and not on any information provided by the CI, and that the CI would not be called as a witness at trial. The circuit court further found that the CI was not present during the execution of the search warrant, the CI was not an active participant in the offenses charged, and the CI's testimony was not necessary for a determination of Werner's guilt or innocence. Thus, the prerequisites for invoking the informer's privilege embodied in HRE Rule 510 and HRPP Rule 16(e)(5)(ii) were satisfied. Werner does not challenge the circuit court's determination that the State was not required to disclose the CI's identity.

The informer's privilege protects from disclosure not only the CI's identity, but information that would tend to reveal the CI's identity. See Kapiko, 88 Hawai'i at 402, 967 P.2d at 234 (concluding that the prosecution is not required to disclose information that "might" identify the CI pursuant to HRPP Rule 16(e)(5)(ii)); People v. Hobbs, 873 P.2d 1246, 1252 (Cal. 1994); Roviaro v. United States, 353 U.S. 53, 60 (1957). On the other hand, information that will not tend to reveal the identity of the CI is not privileged. Roviaro, 353 U.S. at 60. Thus, the trial court must determine whether the information in a search warrant affidavit that the prosecution seeks to withhold from the defense would tend to reveal the CI's identity. Hobbs, 873 P.2d at 1253.

Where a search warrant is based on information provided by a CI, there is an inherent tension between the need to protect

the CI's identity and the defendant's right of reasonable access to information that would allow the defendant to challenge the validity of the search warrant. Id. at 1249. In Kapiko, 88 Hawai'i 396, 967 P.2d 228, the Hawai'i Supreme Court addressed the proper balance between these two interests in a context very similar to Werner's case.

In Kapiko, the prosecution had redacted the dates of a CI's observations from a search warrant affidavit because it feared that the disclosure of those dates would lead to the identification of the CI. Id. at 398, 967 P.2d at 230. Defendant Kapiko argued that without the dates of the CI's observations, he could not determine whether the information in the affidavit was stale or refute the factual allegations in the affidavit. Id. at 399, 967 P.2d at 231. The trial court concluded that Kapiko's right to challenge the search warrant would be violated if the dates of the CI's observations were not revealed, and it ordered the prosecution to provide Kapiko with an unredacted copy of the affidavit. Id. at 400, 967 P.2d at 232. When the prosecution refused to turn over the unredacted affidavit, the trial court dismissed the case and the prosecution appealed. Id. at 401, 967 P.2d at 233.

In its decision, the Hawai'i Supreme Court first addressed whether the identity of the CI was privileged under HRE Rule 510 and HRPP Rule 16(e)(5)(ii). The court held that the CI's identity was privileged under both provisions and that the prosecution was not required to disclose information that "would

lead to the identification of" or "might identify" the CI. Id. at 401-02, 967 P.2d at 233-34. The court then addressed Kapiko's argument that he needed to know the dates of the CI's observations to challenge the validity of the warrant:

Kapiko contended that he needed to know the period of time in which the CI's observations were made in order to address the issue of possible staleness. However, in order to address this issue, it was not necessary for Kapiko to have the specific dates of the CI's observations. Instead, the circuit court should have allowed Officer Nakagawa to testify to a range of dates within which the CI's observations occurred. This would have allowed the prosecution to reveal the information to Kapiko in a manner that would decrease the risk of leading to the identification of the CI. Courts in other jurisdictions do not require the prosecution to turn over the exact dates of a CI's observations in an affidavit in support of a search warrant.

Id. at 403, 967 P.2d at 235.

The court summarized its holding as follows:

In the face of a defense challenge that a CI's observations may be stale, but disclosure of the exact dates would reveal the identity of the CI, the prosecution should be ordered to provide a range of dates within which the observations occurred. The reviewing court, in determining staleness, must treat the observations as occurring on the most remote date within the time period. . . .

Therefore, the exact dates of the CI's observations were not necessary in order for Kapiko to challenge the district court's finding of probable cause, and, because revealing the dates would lead to the identification of the CI, we cannot say that the "possible significance of the [exact dates] to the defense" outweighed the "public interest in protecting the flow of information." It was not a violation of Kapiko's due process right to a fair trial for the prosecution to refuse to reveal the dates to Kapiko. Revealing a range of dates strikes a median ground between revealing the exact dates and dismissing the complaint.

Id. at 404, 967 P.2d at 236 (brackets in original; footnote omitted) (emphasis added). The court vacated the order dismissing the complaint and remanded for further proceedings.

Id.

Implicit in Kapiko is that a court is not free to determine the staleness issue simply by reviewing the affidavit

in camera to see when the CI's observations allegedly occurred. Otherwise, the Hawaii Supreme Court could have resolved the staleness issue in Kapiko based on its own review of the unredacted affidavit or by directing the trial court to rule based on an *in camera* review. Requiring the disclosure of a range of dates for the CI's observations and activities provides a defendant with information that may enable him or her to challenge the validity of the warrant. For example, Werner argued that if he was provided with a range of dates for the CI's activities, he might be able to show that he was on the mainland when the CI allegedly purchased drugs from him. The Kapiko decision balanced the need to protect the CI's identity with the defendant's right to challenge the validity of the search warrant.

At minimum, Kapiko establishes a presumption that the prosecution is required to disclose a range of dates regarding the CI's observations and activities. Here, the circuit court made no finding, and the record does not show, that the State could not provide a range of dates to Werner without revealing the CI's identity.⁹ We therefore conclude that the circuit court erred in failing to follow Kapiko by ordering the prosecution to

⁹ We note that in People v. Hobbs, 873 P.2d 1246 (Cal. 1994), the California Supreme Court held that if necessary to protect the identity of a confidential informant, all or any part of a search warrant affidavit may be sealed and the warrant's validity determined through *in camera* proceedings, even if these actions deprive the defendant from gaining access to information necessary to challenge to the warrant. Id. at 1259-60. In this appeal, we do not address what the result should be where the need to protect a confidential informant's identity precludes the disclosure of any meaningful information regarding the basis for the warrant.

provide Werner with a range of dates within which the CI's observations and activities occurred.

We also note that the redactions to Detective Sato's affidavit were done in a manner that rendered what was disclosed unnecessarily confusing and difficult to decipher. For example, numerous portions of the affidavit were blacked out without any indication of whether the obscured material referred to a date, actions taken by the CI, or actions taken by some other person. It appears that the redacted affidavit could be made more understandable, without compromising the confidentiality of the CI's identity, by including parenthetical information or a summary explaining the nature of the information being redacted.

On remand, the circuit court is directed to order the State to disclose a range of dates within which the CI's observations and activities referenced in Detective Sato's affidavit occurred. We also direct the circuit court to review the redactions made to the affidavit to determine whether they pertain to information that would tend to reveal the identity of the CI. The circuit court shall order the State to disclose any previously-redacted information in the affidavit where the court finds that the redaction was not appropriate. Werner shall be given the opportunity to challenge the validity of the search warrant based on the additional disclosures made by the State through a motion to suppress the evidence obtained pursuant to the warrant. If the circuit court thereafter upholds the validity of the warrant and finds that the absence of the

additional disclosures did not prejudice Werner's right to a fair trial, the circuit court may reinstate Werner's Judgment without holding a new trial.

CONCLUSION

We vacate the circuit court's September 3, 2004, Judgment and we remand the case for further proceedings consistent with this memorandum opinion.


DATED: Honolulu, Hawai'i, December 4, 2006.

On the briefs:

Michael Jay Green,
Robin Melchor,
for Defendant-Appellant

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee

Corinne KA Watanabe
Presiding Judge


Associate Judge

Craig H. Nakamura
Associate Judge