NO. CAAP-15-0000342

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant, v.
RUDOLPH G. KING, JR., Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 14-1-1986)

MEMORANDUM OPINION
(By: Leonard, Presiding Judge, Reifurth and Ginoza, JJ.)

Plaintiff-Appellant the State of Hawai'i (**the State**) appeals from the Order Granting Defendant-Appellee Rudolph G. King, Jr.'s [(**King's**)] Motion to Dismiss Felony Information, which was filed in the Circuit Court of the First Circuit (**Circuit Court**)[1] on March 19, 2015 (**Order Granting Motion to Dismiss**). The Felony Information charged King with Burglary in the Second Degree (**Burglary 2**) in violation of Hawaii Revised Statutes (**HRS**) § 708-811 (2014).

I. BACKGROUND FACTS

For the purpose of King's motion to dismiss, the following facts were not in dispute. On November 11, 2014, King

[1] The Honorable Dean E. Ochiai presided.

entered the Times Supermarket, Kaimuki store, located at 3221 Waialae Avenue in Honolulu. A loss protection officer (LPO) observed King concealing merchandise and then exiting the store without paying for that merchandise. The LPO detained King and issued him a trespass warning. The warning stated (in all capitalized letters):

> You are hereby advised that your presence is no longer desired on the premises or property listed above and on all properties listed on the back of this warning. This serves notice that you are not to return to said property for the duration listed above. Violations of this warning will subject you to arrest and prosecution for trespassing pursuant to section 708-814 of the Hawaii Penal Code.

The back of the warning included the names and addresses of all Times Supermarket stores, including the McCully store, which is located at 1772 South King Street in Honolulu. The trespass warning was in effect from November 11, 2014, through November 11, 2015, and was signed by King, as well as by a police officer who was present.

On December 18, 2014, at the McCully Times store, the same LPO who observed and detained King at the Kaimuki store on November 11, 2014, saw King take a bone-in rib-eye roast from the meat section and place it in his backpack. King then exited the store without paying for the roast. The LPO detained King outside of the store and, after King was detained, King acknowledged that he had been previously issued a trespass warning. The LPO detained King until the police arrived, and King was arrested on suspicion of Burglary 2.

On December 20, 2014, King was charged by Felony Information with Burglary 2.[2] On January 30, 2015, King's attorney, Deputy Public Defender Jason Kramberg (**Kramberg**), filed a Motion to Dismiss Felony Information for Lack of Probable Cause and/or De Minimis Violation pursuant to, *inter alia*, Hawai'i Rules of Penal Procedure (**HRPP**) Rule 12 (**Motion to Dismiss**).[3] On February 13, 2015, the State filed a memorandum in opposition to King's motion. On February 20, 2015, the Circuit Court held a hearing. At the hearing, King conceded that he should be charged with Theft in the Fourth Degree[4] and Criminal Trespass in the Second Degree,[5] which are both petty misdemeanors, but argued

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[2] On December 26, 2014, the State filed an Amended Felony Information correcting an erroneous spelling of King's first name in the initial Felony Information.

[3] HRPP Rule 12 (2007) states, in relevant part:

> **(b) Pretrial motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> . . . .
>
> (2) defenses and objections based on defects in the charge . . .

[4] HRS § 708-833 (2014) provides:

> **§ 708-833 Theft in the fourth degree.** (1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of $100.
>
> (2) Theft in the fourth degree is a petty misdemeanor.

[5] HRS § 708-814 (2014) provides, in relevant part:

> **§ 708-814 Criminal trespass in the second degree.** (1) A person commits the offense of criminal trespass in the second degree if:
>
> . . . .
>
> (b) The person enters or remains unlawfully in or upon commercial premises after a reasonable

(continued...)

that the Burglary 2 charge was improper because the intent of the burglary statute was not to feloniously penalize entry onto a property that was open to the public. After hearing arguments from both parties on the motion, the Circuit Court stated, in part:

> The Court's of the belief that a trespass warning does not give it -- does not give rise to having it become a

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[5](...continued)

> warning or request to leave by the owner or lessee of the commercial premises, the owner's or lessee's authorized agent, or a police officer; provided that this paragraph shall not apply to any conduct or activity subject to regulation by the National Labor Relations Act.
>
> For the purposes of this paragraph, "reasonable warning or request" means a warning or request communicated in writing at any time within a one-year period inclusive of the date the incident occurred, which may contain but is not limited to the following information:
>
> (i) A warning statement advising the person that the person's presence is no longer desired on the property for a period of one year from the date of the notice, that a violation of the warning will subject the person to arrest and prosecution for trespassing pursuant to section 708-814(1)(b), and that criminal trespass in the second degree is a petty misdemeanor;
>
> (ii) The legal name, any aliases, and a photograph, if practicable, or a physical description, including but not limited to sex, racial extraction, age, height, weight, hair color, eye color, or any other distinguishing characteristics of the person warned;
>
> (iii) The name of the person giving the warning along with the date and time the warning was given; and
>
> (iv) The signature of the person giving the warning, the signature of a witness or police officer who was present when the warning was given and, if possible, the signature of the violator[.]
>
> . . . .
>
> (3) Criminal trespass in the second degree is a petty misdemeanor.

> vehicle to charge a Burglary in the Second Degree. I see two charges here. I see a Criminal Trespass in the Second Degree and a Theft Fourth Degree charge just based upon all that the Court has had to consider during the course of this hearing.
>
> So I'll grant the motion to dismiss the Burglary in the Second Degree charge with prejudice. . . .
>
> However, the State is free to refile other charges that the facts in this case may give rise to.
>
> . . . .
>
> [H]e violated the trespass warning the moment he stepped into the McCully store.
>
> . . . .
>
> To me it looks like two separate crimes here. He stepped onto the property. That's Criminal Trespass 2. I'm just saying this for this hearing. And then none of these facts have been proven, and then he commits a theft.
>
> I don't see a -- this is not like continuing course. This is not like a -- a theft that occurs over time in which, yes, you can accumulate until you can get to felony level theft. If it's embezzlement or whatever and you're charged with a felony, that's fine with the Court. But this appears to be two discrete crimes.
>
> . . . .
>
> I think at this point the State is stretching this -- what should be two petties into a Class C.

On March 19, 2015, the court issued the Order Granting Motion to Dismiss. On April 16, 2015, the State timely filed a notice of appeal.

II. POINTS OF ERROR

The State raises a single point of error on appeal, arguing that the Circuit Court erred in granting Defendant's Motion to Dismiss.

III. STANDARDS OF REVIEW

Like a Grand Jury Indictment, a Felony Information must be based on probable cause to believe that the offense charged was committed.

> The Hawai'i Supreme Court has held that the *de novo* standard applies in appellate reviews of probable cause determinations. State v. Navas, 81 Hawai'i 113, 123, 913 P.2d 39, 49 (1996). Probable cause refers to the "state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." State v. Naeole, 80 Hawai'i 419, 424, 910 P.2d 732, 737 (1996). Moreover, "probable cause is generally based upon a combination of factors, which together form a sort of mosaic, of which any one piece by itself often might not be enough to constitute probable

> cause, but which, when viewed as a whole, does constitute probable cause." State v. Chong, 52 Haw. 226, 231, 473 P.2d 567, 571 (1970). Accordingly, we consider the totality of the circumstances to determine, *de novo*, whether [there existed probable cause].

State v. Ferrer, 95 Hawai'i 409, 430-31, 23 P.3d 744, 765-66 (App. 2001).

An appellate court reviews a trial court's ruling on a motion to dismiss for *de minimis* violation for abuse of discretion. State v. Rapozo, 123 Hawai'i 329, 336, 235 P.3d 325, 332 (2010). A court abuses its discretion if it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant. Id.

The interpretation of a statute is a question of law reviewed de novo. State v. Kuhia, 105 Hawai'i 261, 269, 96 P.3d 590, 598 (App. 2004).

> When interpreting a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, a court's only duty is to give effect to the statute's plain and obvious meaning.

Id. (citations and brackets omitted; format altered).

IV. DISCUSSION

A. Probable Cause

King was charged with Burglary 2, in violation of HRS § 708-811, which provides:

> **§ 708-811 Burglary in the second degree.** (1) A person commits the offense of burglary in the second degree if the person intentionally enters or remains unlawfully in a building with intent to commit therein a crime against a person or against property rights.
>
> (2) Burglary in the second degree is a class C felony.

"Enter or remain unlawfully" is defined in HRS § 708-800 (2014) as follows:

> "Enter or remain unlawfully" means to enter or remain in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of the person's intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to the person by the owner of the premises or some other authorized person.

(Emphasis added.)

As both parties recognize, under a plain reading of the above statutory language, the Burglary 2 statute includes the situation at bar, as King is alleged to have intentionally entered Times Supermarkets' premises in defiance of a lawful order not to enter the premises, which had been personally communicated to King by an authorized person, *i.e.*, Times Supermarkets' LPO, with the intent to commit a crime therein against property rights. King points to no ambiguity in the statute and we find none.

Citing Friends of Makakilo v. D.R. Horton-Schuler Homes, LLC, 134 Hawai'i 135, 139, 338 P.3d 516, 520 (2014), King argues that even if the plain language of a statute is clear, the appellate court can nevertheless consider legislative history to ensure that its interpretation of the statute does not produce an absurd or unjust result contrary to legislative intent. However, King fails to cite any legislative history supporting his interpretation and fails to show that the plain language reading of HRS §§ 708-800 and 708-811 would produce an absurd or unjust result that is inconsistent with the policies of the Burglary 2 statute.

We recognize that Burglary 2 is a class C felony, which carries a maximum sentence of five years of imprisonment. HRS §§ 708-811(2), 706-660(1)(b) (2014). Criminal trespass in the second degree and theft in the fourth degree are both petty misdemeanors, punishable by a maximum of thirty days imprisonment for each offense. HRS §§ 708-814(3), 708-833(2), 706-663 (2014). Thus, charging King with the class C felony, rather than with the two petty misdemeanors, has the potential for far more serious consequences. Nevertheless, it appears from, *inter alia*, the Commentary to the Hawai'i Burglary statutes that this potential result was understood by the drafters of the Model Penal Code provisions upon which Hawaii's Burglary statutes are based. Although not evidence of legislative intent,[6] the Commentary to HRS §§ 708-810 and 708-811 bemoans the fact that the Burglary statutes, as written, have the potential for harsh consequences, and notes that reform may be necessary:

> If we were writing on a clean slate, the best solution might be to eliminate burglary as a distinct offense. . . . But we are not writing on a clean slate. . . The needed reform must therefore take the direction of narrowing the offense to something like the distinctive situation for which it was originally devised: invasion of premises under circumstances specially likely to terrorize occupants.

(Quoting the commentary from the Model Penal Code Tentative Draft No. 11, comments at 57 (1960).) Despite the Commentary, we must consider the relevant statute as adopted.

The Hawai'i Supreme Court "has consistently reaffirmed the proposition that 'where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond

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[6] See HRS § 701-105 (2014).

that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning.'" State v. Stan's Contracting, Inc., 111 Hawai'i 17, 24, 137 P.3d 331, 338 (2006) (quoting State v. Yamada, 99 Hawai'i 542, 553, 57 P.3d 467, 478 (2002) (quoting State v. Richie, 88 Hawai'i 19, 30, 960 P.2d 1227, 1238 (1998))). Thus, "this court cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. This is because we do not legislate or make laws." Seki ex rel. Louie v. Hawaii Gov't Emp. Ass'n, AFSCME Local No. 152, AFL-CIO, 133 Hawai'i 385, 408, 328 P.3d 394, 417 (2014) (citation omitted).

Finally, as argued by King, a New Mexico Court of Appeals has held that entry into a commercial business establishment contrary to a no-trespass order does not constitute an "unauthorized entry" into the business under New Mexico's commercial burglary statute. However sound under the laws of New Mexico, that court's reasoning does not give us license to depart from the above-referenced Hawai'i authorities. See State v. Archuleta, 346 P.3d 390 (N.M. App. 2014), cert. granted, 350 P.3d 91 (N.M. Jan. 26, 2015), cert. quashed, 367 P.3d 441 (N.M. May 11, 2015); but see State v. Kutch, 951 P.2d 1139, 1140-41 (Wash. App. 1998) (holding that a person whose invitation to be on premises has been expressly limited or revoked, and who exceeds that limitation, or contrary to the revocation enters the building with intent to commit a crime, engages in conduct that is both burglarious and felonious); State v. Ocean, 546 P.2d 150, 152-53 (Or. App. 1976) (similarly upholding burglary conviction

where unlawful entry element was based on prior bar from premises), abrogation recognized by State v. Collins, 39 P.3d 925 (Or. App. 2002).

Accordingly, we conclude that, in this case, the Felony Information is supported by probable cause to charge King with Burglary 2.

B. *De Minimis* Violation

HRS § 702-236 (2014) sets forth the bases for a court's dismissal for *de minimis* offense:

> **§ 702-236 De minimis infractions.** (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense;
>
> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
>
> (2) The court shall not dismiss a prosecution under subsection (1)(c) of this section without filing a written statement of its reasons.

Notably, "insofar as the *defendant* advances a motion to dismiss on *de minimis* grounds, it is the *defendant*, and not the prosecution, who bears the burden of proof on the issue." State v. Oughterson, 99 Hawai'i 244, 256, 54 P.3d 415, 427 (2002). The defendant also bears the burden of establishing why dismissal of the charge as a *de minimis* infraction is warranted in light of the circumstances. Rapozo, 123 Hawai'i at 331, 235 P.3d at 327.

In ruling on a motion for relief pursuant to HRS § 702-236,

> all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense should be shown to the judge. Such a disclosure would then enable the judge to consider all of the facts on this issue, so that he can intelligently exercise a sound discretion, consistent with the public interest, whether to grant the dismissal of a criminal case. In addition, this court outlined a number of factors for the trial court to consider in making its determination, including (1) the background, experience and character of the defendant; (2) knowledge on the part of the defendant of the consequences of the act; (3) the circumstances surrounding the offense; (4) the harm or evil caused or threatened by the offense; (5) the probable impact of the offense on the community; (6) the seriousness of the punishment; (7) the mitigating circumstances; (8) possible improper motives of the complainant or prosecutor; [and] (9) any other data which may reveal the nature and degree of the culpability in the offense committed by each defendant.

Id. at 343-44, 235 P.3d at 339-40 (citations and brackets omitted, formatting altered) (citing State v. Park, 55 Haw. 610, 616, 525 P.2d 586, 591 (1974)).

In his motion to dismiss, King argued that his actions did not cause or threaten the harm or evil sought to be prevented by HRS § 708-811 because that law was meant to apply to "invasion of premises under circumstances specially likely to terrorize occupants," and that it was "not meant to apply to instances of shoplifting from a commercial premises." At the hearing on his motion, King further argued that petty misdemeanors, which carry thirty-day maximum sentences, would be more appropriate charges for this criminal behavior than a class C felony, which can bring a five-year prison term. Although we have rejected these points as grounds for dismissal as a matter of law, they are nevertheless relevant factors in a *de mininis* analysis. King did not offer support for the other Rapozo factors, such as his background and character, the circumstance surrounding the offense, any mitigating circumstances, improper motives of the

complainant or prosecutor, or other data regarding the nature and degree of his culpability.

The Circuit Court did not enter written findings of fact and conclusions of law, and neither its oral ruling or its written order specifically state whether the court's ruling was based on King's probable cause argument or his *de minimis* violation argument. The court's on-the-record comments appear to indicate that its decision was based solely on whether there was probable cause to charge King under the Burglary 2 statute, as the court stated, *inter alia*, that the State was "estopped from filing a Burglary in the Second Degree charge on this case." The court mentioned certain factors that may be relevant to analysis under HRS § 702-236(1)(b) and/or (c), as the court: referenced that the trespass warning did not give notice that a violation could give rise to a Burglary 2 charge; stated that because the entry was into a different store, the court was less inclined to allow the State to go forward with the charge; and referenced the seriousness of the much greater punishment associated with the felony, as opposed to two petty misdemeanors. However, on this record, we cannot conclude that the Circuit Court exercised its discretion based on the request for dismissal on *de minimis* grounds. Therefore, on remand, the Circuit Court may further consider the issue of whether to dismiss the charge on *de minimis* grounds and, if it decides to do so, the court is instructed to make written findings that clearly state its reasons.

V. CONCLUSION

Accordingly, the Circuit Court's March 19, 2015 Order Granting Motion to Dismiss is vacated, and this case is remanded for further proceedings consistent with this Memorandum Opinion.

DATED: Honolulu, Hawai'i, May 31, 2016.

On the briefs:

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellant.

Jon N. Ikenaga,
Deputy Public Defender,
for Defendant-Appellee.

Presiding Judge

Associate Judge

Associate Judge