IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Plaintiff-Appellant,

vs.

MURPHY TAUʻA, Defendant-Appellee.

NO. 23992

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 00-1-0050(2))

JUNE 28, 2002

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.;
RAMIL AND ACOBA, JJ., NOT JOINING[1]

OPINION OF THE COURT BY LEVINSON, J.

The plaintiff-appellant State of Hawaiʻi (the prosecution) appeals from an order of the second circuit court, the Honorable Shackley F. Raffetto presiding, granting the defendant-appellee Murphy Taua's motion to suppress (1) evidence that Maui Police Department (MPD) officers seized in executing a search warrant upon a vehicle in which Tauʻa had been a passenger and (2) a written statement that Tauʻa subsequently gave to the

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[1] A separate opinion or opinions will be filed subsequently.

police.[2] On appeal, the prosecution principally contends that the circuit court clearly erred in connection with three of its findings of fact (FOFs) and, consequently, wrongly concluded, in its two conclusions of law (COLs), that a canine screening of the interior of the vehicle infringed upon Taua's federal and state constitutional rights to be free from unreasonable searches,[3] and, thus, required that the evidence obtained as a result of and tainted by the canine screen be suppressed at trial.

We hold on the record in this case that, because Taua's personal constitutional rights were not violated by the canine screen, Tauʻa could not invoke either article I, section 7 of the Hawaiʻi Constitution or the fourth amendment to the United States Constitution, see supra note 3, as a basis for suppressing the evidence recovered from the vehicle. Because the officers' subsequent search of the vehicle -- executed pursuant to a warrant obtained, in part, upon the canine's "alert" to the presence of narcotics in the vehicle -- was not unconstitutional with respect to Tauʻa, the circuit court further erred in concluding that Taua's subsequent written statement was "tainted" and inadmissable. Accordingly, we remand this matter for further proceedings.

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[2] Pursuant to Hawaiʻi Revised Statutes (HRS) § 641-13(7) (1993), "[a]n appeal may be taken by and on behalf of the State from the district or circuit courts to the supreme court, subject to [HRS ch.] 602, in all criminal cases . . . [f]rom a pretrial order granting a motion for the suppression of evidence, including a confession or admission[.]"

[3] Article I, section 7 of the Hawaiʻi Constitution (1978) provides in relevant part that "the right of the people to be secure in their persons . . . and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue except on probable cause[.]" Similarly, the fourth amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause[.]"

I. BACKGROUND

A. Factual Background

On December 28, 1999, MPD officers executed warrants to arrest and search the person of Aaron Yamashita.[4] Acting on information that Yamashita would be in a particular area -- specifically, an Eagle Hardware parking lot located in the Maui Market Place -- in the late afternoon of December 28, 1999, approximately a dozen officers, in five different vehicles, participated in apprehending Yamashita. The officers awaited Yamashita's arrival in the area; when he arrived, driving a two-door "red king cab F-150 Ford pickup truck," the officers followed him and, shortly thereafter, succeeded in stopping the truck that he was driving.

In the truck with Yamashita, at the time the officers stopped it, were, in the front passenger seat, Jennifer Biho and, in the back seat, Tauʻa. Although the officers ordered all three occupants out of the truck, it appears that they did not immediately heed the officers, because the record reflects that the officers themselves "opened" the truck's doors and that Yamashita was "taken out of the [truck] and proned out," Biho was "taken out of the [truck]," and Tauʻa was "removed" from the truck, which, apparently, necessitated that two officers briefly enter it in order to reach him in the back seat.[5] Yamashita, Biho, and Tauʻa were kept separated. The officers did not have warrants to search or arrest either Biho or Tauʻa; nor did the officers have a warrant to search anything other than Yamashita's person.

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[4] Neither of these warrants were made a part of the record on appeal.

[5] The record does not reflect the particular circumstances that prompted the officers to remove the occupants from the truck.

The warrant authorizing a search of Yamashita's person was not, however, immediately executed. Rather, the officers asked Yamashita for his consent to search the truck. He refused, responding that the truck was not his.[6] Thereafter, within approximately ten or fifteen minutes of the officers stopping the truck, MPD Officer William Gannon, together with his "drug detection dog" Ben,[7] conducted a "canine screening" of the truck.[8] Officer Gannon described the canine screening that he conducted with Ben of the truck as follows:

> Utilizing a leash, we start[ed] at the front of the vehicle, work[ing our] way along the driver's side. At this point in time the door had been open[ed] [p]rior to my arrival[.] . . . The door was wide open.
>
> Me having a four-foot lead, a leash, Ben detected the odor emanating from within the vehicle and immediately entered the vehicle, jumped over the driver's side seat through this opening between the front seats. There is a console that can fold down[, which] was open.
>
> Ben made entry through that opening and immediately alerted to the base of the [front] passenger side seat.

Throughout his testimony, adduced during the hearing conducted in connection with Taua's motion to suppress, Officer Gannon consistently asserted that Ben had first detected the odor of narcotics while outside the vehicle, but did not "alert" to the actual location of those narcotics under the front passenger side seat until inside the truck.[9] According to Officer Gannon, Ben

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[6] It appears that the officers, at some point that is not clear from the record, learned that the registered owners of the truck were Jay and Daralynne Pagay; MPD Officer Michael Callinan, who was present during the search, testified that he believed that officers may have unsuccessfully attempted to contact the Pagays in order to obtain their consent to search the truck.

[7] Ben is "[a] Belgian Malinois, he is a 60-pound canine. He is a male, very, very highstrung, agile, [and] can jump six feet no problem. These dogs are quick and agile. That's why," according to Officer Gannon, "law enforcement uses them."

[8] At the time that Officer Gannon and Ben conducted the canine screening, Yamashita was "handcuffed on the ground."

[9] Specifically, Officer Gannon testified as follows:

(continued...)

is trained to "go to the strongest source [of an odor he has detected] as fast as he can," or, in other words, to "follow his nose." Officer Gannon asserted that detecting or "indicating" an odor is distinct from an "alert," but did not elaborate with any degree of specificity as to what the distinction was. However, Officer Gannon did explain that, "[o]nce [Ben] indicates [an] odor, he's going to take his nose, which is trained to detect the odor at the strongest source."

Because of Ben's size, temperament, quickness, agility, and training, Officer Gannon asserted that he could not have prevented Ben from jumping into the truck once Ben had detected the odor of narcotics emanating from it. After Ben "alerted" to the presence of narcotics in the truck, Officer Gannon told him, "Good boy," pulled him out of the truck, and ceased conducting the canine screening. Throughout Ben's sojourn in the truck, Officer Gannon asserted that he did not enter it himself, but conceded that his "hand maybe" broke "the pla[ne] of the door" as he was pulling Ben out of the truck. After Ben "alerted" to the presence of narcotics in the truck, Officer Callinan executed the warrant to search Yamishita's person; however, Officer Callinan did not find anything incriminating on Yamashita's person.

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[9](...continued)

> I started walking the dog around the open door, and then he detected the odor and jumped in and went behind the seat.
>
> . . . .
>
> He is on my left-hand side in a heel, following me. He detected the odor. At that point in time we were clearing the open end of the door and --
>
> . . . .
>
> . . . [W]e are walking around this door. He detects the odor and immediately goes in through -- hops on the seat through that opening and alerts.

The truck was towed to a police station pending the issuance of a warrant to search it. Subsequently, upon Officer Gannon's affidavit,[10] a warrant was issued to search the truck, and, in executing the warrant, officers found: (1) various items of alleged drug paraphernalia, some of which contained "residue," in the "third door/panel"; (2) a nine millimeter semi-automatic pistol under "the back seat" (apparently on the driver's side); and (3) a "cut plastic straw (loader)," apparently under the

[10] In addition to relating the officer's experience and training, as well as Ben's training and abilities, Officer Gannon's affidavit contained information that Officer Callinan had conveyed to him regarding the latter's investigation of Yamashita. Specifically, Officer Callinan had informed Officer Gannon that a confidential informant, whom the MPD narcotics vice section had known for two years and who had provided them with reliable information in the past, had informed Officer Callinan that, during the week of December 26, 1999, Yamashita possessed "about one [] pound of crystal methamaphetamine and that Yamashita had instructed the informant to meet him at "the Eagle Hardware, within the Maui Market Place[,] on December 28, 1999 at around 4:30 p.m.," the area, that is, where the officers encountered and arrested Yamashita as described above. (Some capitalization amended.) On the basis of this information, Officer Gannon's affidavit related, Officer Callinan "obtained a search warrant" to search Yamashita's person; the affidavit also notes that there was an outstanding bench warrant for Yamashita's arrest. Officer Gannon's affidavit further related the circumstances of Yamashita's arrest and the seizure of the truck he was found to be driving, including the fact that the truck was registered to Jay and Daralynne Pagay and that Officer Callinan, because of his ongoing investigation of Yamashita, "suspected that [c]rystal [m]themaphetamine [was] currently in the pickup truck." Officer Gannon noted that Yamashita had refused to consent to the search of the truck and, with respect to the canine screening of the truck, related

> [t]hat, at approximately 5:03 P.M., Affiant utilized the [MPD's] Narcotic Detection Canine "BEN" in screening the . . . truck[.] . . . Affiant observed the Narcotics Detection Canine "BEN" alert between the back seat and the center console within the vehicle, indicating the presence of an odor of an unknown illegal controlled substance within[.] . . . [T]he driver[']s side door was halfway opened prior to my arrival[,] and . . . Canine "BEN" entered the vehicle of his own free will.

Officer Gannon's affidavit averred that, through his experience and training, he "kn[e]w . . . that those involved in the use and distribution of illegal [n]arcotics often transport and store illegal [n]arcotics within their vehicles or carry it on their person." The affidavit concludes with a specification of the contraband that he suspected might be within the truck.

front seat.[11] These items predicated the three-count indictment against Tauʻa in the present matter, which charged him with committing, as either a principal or an accomplice, the offenses of promoting a dangerous drug in the third degree, in violation of Hawaiʻi Revised Statutes (HRS) § 712-1243(1) (1993), prohibited acts related to drug paraphernalia, in violation of HRS § 329-43.5(a) (1993), and unlawful place to keep a firearm, in violation of HRS § 134-6(d) (Supp. 2000).

The record on appeal contains scant factual information as to what transpired after Ben alerted to the presence of narcotics in the truck. However, it appears that, at some point after the truck was searched and the foregoing items found, Tauʻa was arrested, initialed and signed a MPD Form No. 103, which informed him of his "constitutional rights" and pursuant to which he waived those rights, and gave a written statement to police.[12]

B. Procedural Background

Before his trial was due to commence, Tauʻa filed a motion in which he sought to suppress and preclude the prosecution from using at trial (1) "all evidence [that] was seized . . . on December 28, 1999[,] as such search and seizure violated [his] rights under Article I, Section 7 of the Hawaiʻi State Constitution and the Fourth and Fourteenth Amendments of

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[11] MPD officers also recovered nearly eight thousand dollars in "U.S. currency," a "floral purse" containing papers bearing Biho's name and various cosmetics, Yamashita's "phone address book," two cell phones, and a "Radio Shack scanner."

[12] Taua's statement has not been made a part of the record on appeal, nor was it admitted into evidence at the suppression hearing. However, a copy of his written statement is appended to the prosecution's opening brief. In his statement, Tauʻa asserts that the firearm recovered from the truck was not his and that he thought it belonged to Yamashita. Tauʻa further asserted that he believed Yamashita owned several other firearms, sketching, as one of them, what appears to be a submachine gun with a scope.

the United States Constitution,"[13] and (2) "all statements made . . . by [him] as tainted fruits of the initial unlawful search and seizure." Conceding that, generally speaking, a person does not have a reasonable expectation of privacy in the air surrounding his or her effects and, therefore, that "a narcotics detection dog may sniff the air outside a car or a suitcase without a search warrant," the crux of Taua's argument was that "the police may not[, however,] send the dog into a car or closed container to physically venture into places where the police may not go." Tauʻa cited several federal cases and this court's decision in State v. Groves, 65 Haw. 104, 649 P.2d 366 (1982), as support for his position.

Because, in Taua's view, Ben's alert to the presence of narcotics was unlawful, it could not be used as a predicate for establishing probable cause to issue a warrant to search the truck; thus, Tauʻa contended that Officer Gannon's affidavit, see supra note 10, redacted of its references to Ben's alert, was "insufficient to establish probable cause" to search the truck. Finally, Tauʻa urged that, insofar as both Ben's "dog sniff" and the search warrant "violated the Fourth Amendment and article I, section 7," his subsequent written statement, which was "obtained as a result of [those] violations," was "tainted and must be suppressed as 'fruits of the poisonous tree,'" citing, in this regard, State v. Bonnell, 75 Haw. 124, 856 P.2d 1265 (1993).

In opposition, the prosecution's principal argument was that Tauʻa "had no [reasonable] expectation of privacy [in the truck] because he was a mere passenger in a vehicle [that] was parked in a public parking lot." Thus, the prosecution, citing

[13] Tauʻa incorporated by reference (and appended as an exhibit) the MPD's list of the items recovered from the truck.

both state (including Bonnell) and federal cases, urged that the canine screening that Officer Gannon and Ben conducted, despite any alleged illegality as to Ben's entry into the truck, did not infringe upon Taua's personal constitutional rights under either the fourth amendment or article I, section 7. In the alternative, the prosecution contended that, "even if [Tauʻa] had a reasonable expectation of privacy in the pickup cab area where the canine alerted, the canine's entry [into] the vehicle was not an unreasonable search in violation of the Fourth Amendment or the Hawaii constitution." In support of its position that the canine screening in the present matter did not constitute an unreasonable search, the prosecution principally relied upon United States v. Stone, 866 F.2d 359 (10th Cir. 1989), and Groves, supra. Finally, the prosecution urged that, absent any constitutional violation as to Tauʻa, his subsequent statements were not tainted.

The circuit court conducted a hearing in connection with Taua's motion. At the hearing, the prosecution initially attempted to argue that Taua lacked "standing" to bring the motion, instigating a short exchange between the court and the parties:

> THE COURT: Call your first witness.
> [Deputy Prosecuting Attorney (DPA)]: Your Honor, we think that the defendant should be establishing [his] standing before we have to present evidence.
> THE COURT: Why?
> [DPA]: Because this wasn't his vehicle and he was outside the vehicle and the vehicle was parked in a public parking lot with the doors open.
> He was also not the target of the stop.
> THE COURT: He's charged with possession of the drugs that were found in the truck; right?
> [Defense Counsel]: Yes, after he was taken out as a passenger of that vehicle.
> [DPA]: Yes. He is also charged with the gun.
> THE COURT: I think [that] the burden on the State is to show that the search was okay with respect to this person.
> [DPA]: Okay.

Thereafter, the prosecution called Officers Callinan and Gannon as witnesses; they testified as to the facts set forth supra in section I.A. The prosecution introduced, without objection, five exhibits, specifically, Officer Gannon's affidavit in support of the warrant, a "return and affidavit" that documented the execution of the warrant, a two-page handwritten list of the items found in the truck and seized as evidence, and the MPD "waiver" Form 103 bearing Taua's signature. In the course of examining Officer Gannon, the prosecution began to ask questions pertaining to Taua's statement. The circuit court interrupted the questioning with the query, "What's that got to do with the search?" After the circuit court remarked that "[a]ll we are really talking about here is the dog going into the car," the prosecution ceased its direct examination of Officer Gannon.[14]

At the conclusion of the prosecution's presentation, the circuit court indicated, before it heard argument, that its "inclination" was to grant Taua's motion:

> Okay. Let me focus on this a little bit.
>
> It appears from the record before the court that the truck was stopped and opened legally pursuant to the warrant for arrest and search of the person who was driving the car, and those people were out. The scene was completely secured by the time that the dog screening was ordered, but the door was open to the vehicle.
>
> And it's apparent from the testimony that it was clear to the officer with the dog that the dog was not to be permitted to go into the vehicle; that that would have been an illegal search.[15]
>
> What's unclear is -- I mean, there is evidence -- the only evidence in the record is that the dog actually alerted after it got into the truck, not before, though it's -- I guess it's arguable that he may have smelled something and that's why he went in.
>
> But it's just a[s] fair [an] inference that he got in because the door was open and the dog's transported from place to place by car, and the police officer didn't control

[14] The record reflects one other instance in which the circuit court remarked that "the issue here has to do with that open door."

[15] Officer Gannon testified that he did not intend that Ben enter the vehicle because "[t]hat's an illegal search if I command my canine to enter a vehicle."

> the dog jumping in. That one thing that could have been done to prevent this whole thing from happening is the door being closed. There is no evidence that that could not have happened.
>
> My view is that it's incumbent upon the police to do the search in the correct manner, and that would be not going in the vehicle,[16] and so I think my inclination is to grant the motion for that reason[.]

The court then solicited argument from the parties.

Tauʻa concurred with the circuit court's reasoning, remarking that Officer Gannon should have controlled Ben and that "the dog [shouldn't] control the search." The prosecution, on the other hand, contended that "it's not that [Officer Gannon lacked] control of the dog; it's just that the dog reacted so quickly there was no opportunity to control the dog." In response to the circuit court's remark that "there was no reason given as to if there was any necessity that the door be open" and that Officer Gannon could have closed the door before commencing the canine screening, the prosecution responded that "[h]e didn't have any knowledge that there was a need to close the door at this point."

The circuit court orally granted Taua's motion, ruling as follows:

> Okay. Well, it's the court's view that [Officer Gannon] knew that the dog would not be permitted in the car, and when you walk by with a loose leash, there is a chance the dog could jump in, and that's exactly what happened.
>
> And I think -- you know, the purpose of the Fourth Amendment, in the court's view, is to make sure that -- that searches under the Fourth Amendment are -- that the State, when it does these searches, complies with all the rules that apply to them.
>
> And I think that it's incumbent upon the State to make sure that these kind of accidents don't happen, because when we review them in the court, all we have is the testimony of the people. We don't have -- we weren't at the scene, and so it's hard to say there is no evidence of any exigencies that require that door to be open. It could easily have been closed. The purpose was for screening outside the

[16] The record contains no evidence with respect to any MPD canine screening protocols or any other information as to what the "correct manner" of conducting a canine screening actually is, either in fact or as a matter of constitutional jurisprudence.

> vehicle, not the inside.
>
> And so for those reasons, I am going to go ahead and grant the motion.

Although the prosecution advanced further argument,[17] the circuit court did not alter its ruling and ordered that Tauʻa prepare an appropriate order.[18]

The circuit court's written order granting Taua's motion to suppress contains eight FOFs and two COLs. The circuit court found:

> 1. On December 28, 1999, the truck in which Murphy Tauʻa, Aaron Yamashita, and Jennifer Biho were travelling in was legally stopped by the Maui Police officers assigned in this case who had an arrest and search warrant for Mr. Yamashita.
>
> 2. All of the occupants of the vehicle were removed and out of the truck.
>
> 3. The scene was completely secured by the time the dog screen was ordered, but the door to the truck was open.
>
> 4. It was apparent from the testimony of officer Gannon that he was aware that the dog was not permitted to enter the vehicle as that would have amounted to an illegal search.
>
> 5. The only evidence on the record is that the dog alerted after he entered the truck.
>
> 6. A fair inference is that the dog got into the truck because it had been transported from place to place by car, and the police officer did not control the dog jumping in.
>
> 7. The police closing the door to the truck prior

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[17] Specifically, the prosecution noted that the United States Court of Appeals for the Tenth Circuit held, in Stone, that a canine's entry into a vehicle did not amount to an unreasonable search in the absence of any evidence that police officers physically placed the canine in the vehicle or commanded the canine to enter it and urged that "there is no real reason why . . . law enforcement should have been shutting doors or changing the scene from what it was when [Officer Gannon] arrived at the scene." The circuit court reiterated that, in its view, "law enforcement controlled the scene and allowed the situation to occur, and . . . that it's incumbent upon law enforcement to do it correctly." In response, the prosecution posed a hypothetical: "[i]f a scene is like this scene but the door is closed and the window is open, do officers have an obligation to open the door, close the window, and shut the door, so the dog doesn't jump through the window?" The circuit court replied, "I think they should prevent the dog from jumping through the window, yeah."

[18] The record reflects that the prosecution, although not ordered to do so, submitted a proposed order to the court. In relevant part, the prosecution proposed that the court conclude that, although the initial stop, order to exit the vehicle, physical removal of the occupants from the vehicle, and order to conduct a canine screen of the vehicle were all reasonable and that there was not an unreasonable delay in procuring a canine to conduct the screen, the officers' "failure to prevent [Ben's] entry into the vehicle by shutting the doors constituted an unreasonable search[.]"

> to the dog sniff would have prevented this whole thing from happening.
>
> 8. There was no reason given that there was any necessity that door of the vehicle be open.

And the circuit court concluded:

> 1. Based on the findings the court concludes that the search and seizure did not comply with the requirements of the rules required of this type of dog search and violated Mr. Tauʻa's Hawaii State and United States Constitutional protections.
>
> 2. All of the evidence recovered by this illegal search and seizure and any subsequent statements of Mr. Tauʻa's [are] suppressed and the State is precluded from offering the same at trial.

The prosecution timely appealed from the foregoing order.

II. STANDARDS OF REVIEW

A. Constitutional Law

"We answer questions of constitutional law by exercising our own independent judgment based on the facts of the case. . . . Thus, we review questions of constitutional law under the 'right/wrong' standard." State v. Jenkins, 93 Hawaiʻi 87, 100, 997 P.2d 13, 26 (2000) (citations, some quotation signals, and some ellipsis points in original omitted).

B. Motion To Suppress

"We review the circuit court's ruling on a motion to suppress de novo to determine whether the ruling was 'right' or 'wrong.'" Id. (citations and some quotation signals omitted). Similarly, "[w]hether an actual, subjective expectation of privacy is one that society would recognize as objectively reasonable is a question of law, and the issue is therefore reviewed de novo on appeal." Bonnell, 75 Haw. at 142, 856 P.2d at 1275 (citation omitted).

III. DISCUSSION

On appeal, the prosecution contends that the circuit court's FOF Nos. 5, 6, and 7 are clearly erroneous and that its COL Nos. 1 and 2 are wrong. The prosecution advances several arguments in support of its view that the circuit court erred in granting Taua's motion to suppress, the bulk of which address the constitutional propriety of Ben jumping into the truck and whether this fact renders the canine screening an unreasonable search within the meaning of either the fourth amendment to the United States Constitution or article I, section 7 of the Hawai‘i Constitution, see supra note 3. The prosecution also argues, however, that Tau‘a "had no legitimate expectation of privacy in the area [that Ben] sniffed" and, as such, that his invocation of both the fourth amendment and article I, section 7 is misplaced.

In light of our discussion infra, we agree with the prosecution that, assuming arguendo that, because Ben leapt into the truck, the canine screening constituted a "search" within the meaning of either the fourth amendment or article I, section 7, Tau‘a did not have a reasonable expectation of privacy in the truck (or, more specifically, in the airspace within the cab of the truck). Thus, neither Ben's nor Officer Gannon's conduct violated Taua's state or federal constitutional rights.

At the outset, it is important to identify the constitutional questions that the present matter does not implicate. The items that Tau‘a sought to suppress were not found in a closed container that Tau‘a claimed was his; as such, our constitutional jurisprudence regarding searches of closed containers is not implicated. See, e.g., State v. Wallace, 80 Hawai‘i 382, 394-96, 400-05, 910 P.2d 695, 707-09, 713-18 (1996). Nor is Hawai‘i case law concerning the seizure of passengers,

such as when a police officer orders a passenger to exit a vehicle, apposite to the facts herein. See, e.g., State v. Boloson, 78 Hawai'i 98, 105, 890 P.2d 685, 692 (App. 1994). Specifically, Tau'a has challenged the constitutionality of the canine screen and the sufficiency of the affidavit supporting the issuance of the search warrant assuming the redaction of the information obtained by the canine screen. As such, he has sought to suppress the items subsequently found in the vehicle, as well as his subsequent and purportedly "tainted" statement. Tau'a does not assert any interest in the vehicle at all, be it ownership (as by one to whom the owner has loaned it) or otherwise.

A. The Circuit Court Erred In Concluding That The Canine Screening Violated Tau'a's Fourth Amendment Rights.

Upon the foregoing understanding of the record in the present matter, the circuit court was wrong to conclude that the canine screen infringed upon the rights secured to Tau'a by the fourth amendment to the United States Constitution. As a matter of federal constitutional law, "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978) (citing, inter alia, Simmons v. United States, 390 U.S. 377, 389-90 (1968)). On facts similar, in all material respects, to those presented here, the United States Supreme Court has held that a "passenger qua passenger" does not have a legitimate expectation of privacy in the vehicle in which he or she is a passenger. See id. at 148-49.

In Rakas, the defendants -- all passengers in a vehicle driven, at the time that police officers stopped and searched it,

by its owner -- sought to suppress various items found within the vehicle. Id. at 130-31. The United States Supreme Court reaffirmed that the "'rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure.'" Id. at 139 (quoting Simmons, 390 U.S. at 389) (brackets and ellipsis points in original). Although the "capacity to claim the protection of the Fourth Amendment" does not depend "upon a property right in the invaded place," a defendant "who claims the protection of the [Fourth] Amendment" must assert that he or she "has a legitimate expectation of privacy in the invaded place." Id. at 143 (citing, inter alia, Katz v. United States, 389 U.S. 347, 353 (1967)). In other words,

> a defendant must demonstrate that he [or she] personally has an expectation of privacy in the place searched, and that his [or her] expectation is reasonable; i.e., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas, 439 U.S. at 143-44 & n.12); see also United States v. Padilla, 508 U.S. 77, 81-82 (1993); Minnesota v. Olson, 495 U.S. 91, 95 (1990); United States v. Jacobsen, 466 U.S. 109, 123 n.22 (1984). Thus, because the Rakas defendants asserted "neither a property interest nor a possessory interest in the automobile [searched], nor an interest in the property seized," and because the fact that they were "'legitimately on [the] premises' in the sense that they were in the car with the permission of its owner" was not determinative "of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched," their claims under the fourth amendment "fail[ed]." Id. at 148

(quoting Jones v. United States, 362 U.S. 257, 267 (1960)). In short, the Rakas defendants did not have "a legitimate expectation of privacy" in either the glove compartment or the area under a seat of the car in which the items that they sought to suppress were found. Id. at 148-49.

In all material respects, Rakas is indistinguishable from the present matter. Like the Rakas defendants, Tauʻa was nothing more than a passenger in the vehicle that officers subjected to a canine screen and, subsequently, searched. At no point, even in response to the prosecution's initial argument that he lacked "standing" to invoke the protections of either the fourth amendment to the United States Constitution or article I, section 7 of the Hawaiʻi Constitution, did Tauʻa assert any interest in any part of the vehicle. For that matter, the record is devoid of any indication that he was even in the vehicle with its owner's permission.

Thus, on the record before us, Tauʻa did not carry his burden of establishing that the canine screening or the subsequent search of the vehicle in which he was a mere passenger infringed upon a legitimate expectation of privacy that he held in the areas searched. Indeed, he has never claimed that, during the relevant period, he even held such an actual, subjective expectation, much less one that society would regard as being objectively reasonable. As such, Tauʻa did not establish that the protections afforded to him by the fourth amendment were violated. Accordingly, assuming arguendo that the canine screening amounted to a "search" under federal constitutional law because Ben leapt into the vehicle, the circuit court erred in concluding that the items seized in executing the search warrant upon the vehicle, as well as Taua's subsequent statement, were

inadmissible as a matter of federal constitutional law. See Minnesota v. Carter, 525 U.S. 83, 88 (1998) (noting that in Rakas, 439 U.S. at 132-50, "we held that automobile passengers could not assert the protection of the Fourth Amendment against the seizure of incriminating evidence from a vehicle where they owned neither the vehicle nor the evidence").

B. The Circuit Court Erred In Concluding That The Canine Screening Violated Tauʻa's Article I, Section 7 Rights.

Finally, the circuit court erred in concluding that the police violated Tauʻa's rights under article I, section 7 of the Hawaiʻi Constitution. In State v. Abordo, 61 Haw. 117, 596 P.2d 773 (1979), this court adopted, as a matter of state constitutional law, the United States Supreme Court's holding in Rakas that the proponent of a motion to suppress must establish that his or her own constitutional rights, rather than the rights of a third party, were violated by the challenged search and/or seizure.[19] See also State v. Edwards, 96 Hawaiʻi 224, 232, 30 P.3d 238, 246 (2001) ("the proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his or her own . . . rights were violated"); State v. Araki, 82 Hawaiʻi 474, 483, 923 P.2d 891, 900 (1996) (quoting Abordo for the foregoing proposition). Thus, Tauʻa bore the burden of establishing -- by a preponderance of the evidence, see Edwards, 96 Hawaiʻi at 232,

[19] In doing so, this court approved the United States Supreme Court's view, expressed in Rakas, that a defendant's ability to benefit from the exclusionary rule is a question of substantive law, rather than "standing." See Abordo, 61 Haw. at 121, 596 P.2d at 776. Quite simply, "[a] criminal defendant always has standing to challenge the admission of evidence introduced by the state." State v. Tanner, 745 P.2d 757, 759 (Or. 1987). Whether a defendant may avail him or herself of the exclusionary rule, however, is a question of substantive search and seizure law, i.e., whether his or her own reasonable expectations of privacy have been violated. See Abordo 61 Haw. at 121-22, 596 P.2d at 77.

30 P.3d at 246 (quoting State v. Wilson, 92 Hawai‘i 45, 48, 987 P.2d 268, 271 (1999)) -- that the police officers' conduct, including Ben's, infringed upon the protections afforded to him by article I, section 7.

Article I, section 7 "protects people from unreasonable government intrusions into their legitimate expectations of privacy." Bonnell, 75 Haw. at 136, 856 P.2d at 1272 (citations omitted). As we have remarked, "the primary purpose of both the [f]ourth [a]mendment and article I, section 7 'is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" State v. Lopez, 78 Hawai‘i 433, 441, 896 P.2d 889, 897 (1995) (quoting Bonnell, 75 Haw. at 136, 856 P.2d at 1272). "In ascertaining whether an individual's expectation of privacy brings the governmental activity at issue into the scope of constitutional protection," this court utilizes the two-part test derived from Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring): "'First, [the person] must exhibit an actual, subjective expectation of privacy. Second, that expectation must be one that society would recognize as objectively reasonable.'" Lopez, 78 Hawai‘i at 441-42, 896 P.2d at 897-98 (quoting Bonnell, 75 Haw. at 139, 856 P.2d at 1274); see also Abordo, 61 Haw at 122-23, 596 P.2d at 776-77.

Although we have consistently required defendants seeking to avail themselves of the exclusionary rule to satisfy the Katz/Rakas test -- i.e., to demonstrate that their own reasonable expectations of privacy have been violated -- there is dictum in Abordo acknowledging the so-called "automatic standing" rule established by the United States Supreme Court in Jones v. United States, 362 U.S. 257 (1960). See Abordo, 61 Haw. at 121 n.3, 596 P.2d at 776 n.3. Pursuant to the "automatic standing"

rule, a defendant charged with a "possessory" offense need not establish that his or her own constitutional rights have been violated in order to avail him or herself of the exclusionary rule. See Jones, 362 U.S. at 263-65. Consequently, the defendant must merely establish that the search and/or seizure was illegal -- i.e., that someone's (indeed anyone's) constitutional rights were violated -- and that the evidence sought to be excluded was obtained as a result of the illegal search. For the reasons discussed infra, we decline to adopt the Jones "automatic standing" rule as a matter of state constitutional law.

One year after this court's decision in Abordo, the United States Supreme Court overruled Jones in United States v. Salvucci, 448 U.S. 83 (1980). In Salvucci, seven justices agreed that the "automatic standing" rule enunciated in Jones had "outlived its usefulness" and "now serves only to afford a windfall to defendants whose [f]ourth [a]mendment rights have not been violated." Salvucci, 448 U.S. at 95 (emphasis in original). First, the Court noted that the "cornerstone" of Jones -- the concern that the defendant's testimony offered in support of his or her motion to suppress would subsequently be introduced by the prosecution at trial as evidence of guilt -- had been eroded by Simmons v. United States, 390 U.S. 377 (1968), which held that "testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his [or her] guilt at trial." Salvucci, 448 U.S. at 88. Second, the Court concluded that, due to the evolution of fourth amendment doctrine (specifically, the development of the "legitimate expectation of privacy" analysis), it was no longer inherently contradictory for the prosecution simultaneously to maintain that "a defendant

criminally possessed the seized good, but was not subject to a [f]ourth [a]mendment deprivation[.]" Id. at 90. The Court reasoned that decisions such as Katz and Rakas "clarify that a prosecutor may, with legal consistency and legitimacy, assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure." Id. at 88-89. Finally, citing to the companion case of Rawlings v. Kentucky, 448 U.S. 98 (1980), issued by the Court on the same day as Salvucci, the Court reasoned that "legal possession of a seized good is not a proxy for determining whether the owner had a [f]ourth [a]mendment interest, for it does not invariably represent the protected [f]ourth [a]mendment interest."[20] Id. at 91. Consequently, the Court "simply decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." Id. at 92.

Following Salvucci, this court has generally avoided reliance on Jones, but see State v. Araki, 82 Hawai'i 474, 484, 923 P.2d 891, 901 (1996) (citing Jones for the proposition that it is not enough for a proponent of a motion to suppress to "'claim[] prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else'"); State v. Lo, 66 Haw. 653, 661-62, 675 P.2d 754, 760 (1983) (citing Jones for the proposition that "[a] person permitted to use an apartment may 'invoke the privacy of the premises' to challenge the legality of a search thereof"); State v. Kanda, 63 Haw. 36, 49, 620 P.2d 1072, 1081 (1980) (citing

[20] In Rawlings, the Court specifically held that ownership of an item seized, without more, does not permit a defendant to claim that the state intruded upon his or her own reasonable expectations of privacy. Rawlings, 448 U.S. at 105-06.

Jones for the unremarkable proposition that "[t]he facts and circumstances presented in [an] affidavit [in support of the issuance of a search warrant] must be sufficient for a reasonably cautious person to conclude that the items sought in connection with the crime are probably located within the premises to be searched at the time the warrant is issued"), and, on one occasion, has specifically declined to address whether it would recognize the "automatic standing" rule as a matter of state constitutional law. See State v. Joyner, 66 Haw. 543, 546 n.1, 669 P.2d 152, 154 n.1 (1983).

The majority of our sister states have, as have we, adopted the "legitimate expectation of privacy test" without addressing the "automatic standing" rule as a matter of state constitutional law. See generally David A. Macdonald, Jr., Standing to Challenge Searches and Seizures: A Small Group of States Chart Their Own Course, 63 Temp. L. Rev. 559, 572 n.119 (1990). Among the courts that have addressed whether to adopt or retain the "automatic standing" rule as a matter of state constitutional law, we are aware of six that have expressly rejected or eliminated "automatic standing," see Gahan v. State, 430 A.2d 49 (Md. 1981); People v. Smith, 360 N.W.2d 841 (Mich. 1984); State v. McCrary, 621 S.W.2d 266 (Mo. 1981); People v. Ponder, 429 N.E.2d 735 (N.Y. 1981); State v. Lind, 322 N.W.2d 826 (N.D. 1982); State v. Callaway, 317 N.W.2d 428 (Wis. 1982), and six that have adopted or retained the rule, see Commonwealth v. Carter, 676 N.E.2d 841 (Mass. 1997); State v. Bullock, 901 P.2d 61 (Mont. 1995); State v. Settle, 447 A.2d 1284 (N.H. 1982); State v. Alston, 44 A.2d 1311 (N.J. 1981); Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983); State v. Jones, 2002 WL 925266 (Wash. May 9, 2002). But most of the courts that have approved the

"automatic standing" rule have also either expressly or impliedly abrogated the Katz/Rakas "legitimate expectation of privacy" test to which we subscribe. See Settle, 447 A.2d at 1287 (rejecting the "legitimate expectation of privacy" standard as a matter of state constitutional law as overly "fact-specific"); Alston, 44 A.2d at 1318-19 (rejecting the "legitimate expectation of privacy" standard as "vague" and "contrary to a fundamental principle rooted in Article I, paragraph 7 of the New Jersey Constitution"); Sell, 470 A.2d at 66 (rejecting the "legitimate expectation of privacy" standard, as a matter of state constitutional law, on the ground of being "amorphous"); Jones, 2002 WL 925266 (presuming that the challenged search was impermissible without determining whether anyone's reasonable expectation of privacy had been violated); see also State v. Wood, 536 A.2d 902, 908 (Vt. 1987) (rejecting the "legitimate expectation of privacy" test as a matter of state constitutional law, although not addressing the "automatic standing" rule).

In addition, although the Massachusetts Supreme Judicial Court purports to have retained the "automatic standing" rule, it nevertheless requires defendants with "automatic standing" to satisfy the Katz/Rakas test. In Carter, for example, the Massachusetts Supreme Judicial Court required a defendant cloaked with "automatic standing" to demonstrate that the evidence he sought to suppress was seized as a result of "'police conduct [that] has intruded on [the defendant's own] constitutionally protected reasonable expectation of privacy.'" 676 N.E.2d at 843 (citations omitted). But "automatic standing" is virtually meaningless if the proponent of a motion to suppress must still satisfy the Katz/Rakas test, which the proponent would

be required to do without "automatic standing."[21]

Montana alone has seemingly adopted the "automatic standing" rule while utilizing the "legitimate expectation of privacy" analysis in such a way as to permit a defendant to avail himself or herself of the exclusionary rule under circumstances in which the challenged search violated a third party's "legitimate expectation of privacy." See Bullock, 901 P.2d at 67, 69-70, 75-76. But, of course, such third party standing is contrary to the central holding of Rakas and the tenets of our own jurisprudence pertaining to article I, section 7.

We recognize that, "as the ultimate judicial tribunal with final unreviewable authority to interpret and enforce the Hawai'i Constitution," we may "give broader protection under the Hawai'i Constitution than that given by the federal constitution[,]" State v. Rogan, 91 Hawai'i 405, 423, 984 P.2d 1231, 1249 (1999) (citations and internal quotations signals omitted), "when logic and a sound regard for the purposes of those protections have so warranted." State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974). But we do not believe that logic and a sound regard for the purposes of article I, section 7 require us to dispense with the Katz/Rakas test and adopt the "automatic standing" rule in cases involving defendants charged

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[21] In light of this redundancy, we noted in Joyner that the reasonable expectation of privacy test obviated the need to address whether defendants charged with possessory crimes are accorded "automatic standing" to raise claims of an unreasonable search and seizure. Joyner, 66 Haw. at 546 n.1, 669 P.2d at 154 n.1. Thus, arguably, this court has, albeit in dictum, already deemed the "automatic standing" rule to be meaningless in the wake of our adoption of the Katz/Rakas analysis for challenges under article I, section 7. Prior to Rakas and Salvucci, however, in addressing a fourth amendment challenge, this court did commingle the Jones "automatic standing" rule with the Katz "reasonable expectation of privacy" test in a manner similar to that applied by the Massachusetts Supreme Judicial Court in Carter. See State v. Dias, 52 Haw. 100, 470 P.2d 510 (1970) (examining whether a defendant with "automatic standing" had a reasonable expectation of privacy in the area searched).

with "possessory" crimes.[22]

The exclusionary rule protects only those defendants whose own constitutional rights have been violated; there is no compelling reason to make an exception for defendants charged with possessory offenses. As the United States Supreme Court held in Rawlings, a mere possessory interest in a seized item does not necessarily mean that the possessor's reasonable expectation of privacy has been infringed. Rawlings, 448 U.S. at 105-06. For example, a defendant who leaves evidence in a place readily accessible to the public may retain an ownership interest in his or her possessions, but he or she certainly does not retain any reasonable interest in the "privacy" of the evidence. Consequently, a possessory or ownership interest in a thing cannot serve as a substitute for a determination that a defendant's own reasonable and constitutionally protected expectation of privacy in the thing has been abused.

This does not mean that "effects" are not protected under the United States and Hawai'i Constitutions. To the contrary, effects, like homes and persons, are constitutionally protected. But in order to invoke the protections of the exclusionary rule, the proponent of a motion to suppress must show that constitutional rights personal to him or her have been implicated by the search and/or seizure.

We believe that allowing a defendant charged with a possessory offense to avail himself or herself of the exclusionary rule as a function of the violation of a third party's constitutional rights would produce absurd results. An

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[22] We note that the sole material textual difference between article I, section 7 of the Hawai'i Constitution and the fourth amendment to the United States Constitution is that the Hawai'i Constitution specifically protects persons against "invasions of privacy." See supra note 3.

automobile thief, for example, would be in a position to assert the constitutional rights of the true owner of the automobile as a predicate for the suppression of evidence seized therein. See, e.g., State v. Simpson, 622 P.2d 1199 (Wash. 1980) (plurality opinion) (holding that, pursuant to the "automatic standing" rule, the defendant had the same reasonable expectation of privacy in his stolen automobile as the true owner). Or a defendant who deposits illegal contraband on a neighbor's porch, while attempting to avoid apprehension, could assert the constitutional rights of the neighbor as the basis for suppressing the evidence subsequently discovered pursuant to a police search of the neighborhood. See, e.g., Carter, 676 N.E.2d at 843 (rejecting defendant's "automatic standing" argument and noting that "it would be more than inappropriate to permit a person fleeing from the police to rely on art. 14 [of the Massachusetts Constitution] to suppress evidence that he left on some third person's property"). Requiring that the proponent of a motion to suppress establish that his or her own constitutional rights have been violated, rather than those of a (possibly hypothetical) third party, avoids such anomalous results.

Most importantly, the original justifications for the "automatic standing" rule -- prosecutorial inconsistency and the "self-incrimination dilemma" -- are simply no longer compelling. For the reasons discussed supra, there is nothing inherently inconsistent in prosecuting a defendant for criminal possession of an item seized while maintaining that the seizure did not violate any reasonable expectation of privacy in the item on the defendant's part. Moreover, as we have noted, Simmons has eliminated the possibility that a defendant's testimony given at a suppression hearing might be used as evidence of guilt at

trial.[23] Although Simmons did not specifically address whether a defendant's testimony given at a suppression hearing may be used for impeachment purposes at trial, we do not believe that such a possibility justifies the "automatic standing" rule.

> It is one thing to protect a defendant from the dilemma of having to testify that there was possession to obtain standing at the cost of having that testimony used to incriminate him at trial. It is an entirely different proposition to give defendant protection against exposure of his lying at trial by denying the use of his suppression motion testimony.

Smith, 360 N.W.2d at 847. In any event, whether such testimony may be utilized at trial for impeachment purposes "is an issue which more aptly relates to the proper breadth of the Simmons privilege, and not to the need for retaining automatic standing." Salvucci, 448 U.S. at 94. It is certainly not a reason to exempt defendants charged with possessory offenses from the Katz/Rakas analysis.

In sum, we do not believe that "logic and a sound regard for the purposes of" article I, section 7 of the Hawai‘i Constitution requires us to dispense with the Katz/Rakas analysis and adopt the "automatic standing" rule for defendants charged with possessory offenses. To the contrary, we believe that article I, section 7 protects persons only from infringements of their own reasonable expectations of privacy, regardless of the offense with which they are charged.

As we have noted, the record in the present matter lacks any indication, express or implied, that Tau‘a, at any point, exhibited an actual, subjective expectation of privacy in the cab of the truck, into which Ben intruded when he leapt into

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[23] Indeed, Simmons also grants a form of "use immunity" to defendants charged with nonpossessory offenses. "[T]he protection of Simmons is therefore broader than that of [the automatic standing rule]." Salvucci, 448 U.S. at 89-90.

the vehicle. Upon such a barren record, we cannot say that Tauʻa, a mere passenger (perhaps even an unauthorized passenger), exhibited an actual, subjective expectation of privacy in the vehicle, much less an expectation that society would recognize as objectively reasonable. Accordingly, Tauʻa did not carry his burden of establishing that his own constitutional rights were violated or, put differently, that when Ben entered the vehicle, his own privacy was invaded within the meaning of article I, section 7 of the Hawaiʻi Constitution.

Thus, even assuming that the canine screening might have violated a third party's constitutionally protected right of privacy under article I, section 7, the circuit court was wrong in concluding that the canine screening violated Tauʻa's rights. Consequently, the circuit court was also wrong to conclude that the Hawaiʻi Constitution required suppression of the evidence recovered from the vehicle and Taua's subsequent statement to the police.[24]

[24] Because we hold that the search in the present matter did not infringe Tauʻa's reasonable expectation of privacy, his subsequent statement to the police obviously cannot constitute "tainted fruits of [an] initial unlawful search and seizure." The present matter is, therefore, distinguishable from State v. Poaipuni, No. 22756, slip op. at 14-15 (May 14, 2002), in which the majority opinion recently held that evidence and statements obtained by the police as the result of an illegal search of Poaipuni's home, in which he clearly held a reasonable expectation of privacy, were inadmissible as "fruit of the poisonous tree[.]" Quite simply, without an unlawful infringement of a defendant's reasonable expectation of privacy, there is no "poisonous tree," and, without a "poisonous tree," there can be no "tainted fruits."

IV. CONCLUSION

In light of the foregoing, we vacate the circuit court's order granting Taua's motion to suppress and remand for further proceedings.

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