NO. 21195

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee

vs.

MARK WADE DUNSE, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 96-162K)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Following a third circuit court jury trial, the Honorable Ronald Ibarra presiding, defendant-appellant Mark Wade Dunse (Defendant) was convicted of murder in the second degree, in violation of Hawai‘i Revised Statutes (HRS) § 707-701.5 (1993).[1] The judgment and sentence, from which Defendant timely appealed, were filed on November 5, 1997.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we resolve each of Defendant's claims as follows:

First, Defendant contends that the trial court erred by refusing to exclude from trial evidence obtained as a result of questioning by the police at Defendant's apartment on the evening of January 6, 1996. We hold that Defendant was not subjected to

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[1] HRS § 707-701.5(1) (1993) provides in relevant part that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

custodial interrogation because, at the time of the questioning, (a) Defendant was not a suspect, (b) the police had no evidence connecting Defendant to the crime, (c) Defendant had done nothing to attract police attention, and (d) Defendant consented to the questioning. See State v. Kauhi, 86 Hawai‘i 195, 948 P.2d 1036 (1997); State v. Blanding, 69 Haw. 583, 752 P.2d 99 (1988). Nor, in our view, was Defendant unconstitutionally "seized" during the questioning because (a) the questioning was not a "focused and intrusive quest for criminal wrongdoing," see State v. Trainor, 83 Hawai‘i 250, 256, 925 P.2d 818, 824 (1996), and (b) the questioning was general information gathering and not "designed to elicit responses that would either vindicate or implicate" Defendant in the murder, see State v. Quino, 74 Haw. 161, 172, 840 P.2d 358, 363 (1992).

Second, Defendant contends that he was denied due process of law under article 1, section 5 of the Hawai‘i Constitution by the introduction into evidence of unrecorded statements attributed to him. We hold that Defendant was not denied due process of law by the introduction into evidence of unrecorded statements attributed to him. State v. Kekona, 77 Hawai‘i 403, 886 P.2d 740 (1994).

Third, Defendant contends that the circuit court erred by failing to suppress evidence obtained as a result of the execution of four search warrants on January 8, 1996. Reviewing the affidavit submitted in support of the warrants de novo, State v. Navas, 81 Hawai‘i 113, 123, 913 P.2d 39, 49 (1996), we hold

that the circuit court's probable cause determination was not erroneous.

Defendant also challenges the execution of the warrants. We hold that the circuit court did not err by refusing to suppress evidence obtained through the execution of a warrant upon Defendant's apartment. See HRS § 803-37 (1993). We further hold that the circuit court erred by refusing to suppress evidence recovered from the search of Defendant's automobile because the search exceeded the scope of the search warrant. See Andreson v. Maryland, 427 U.S. 463, 480 (1976) (citation omitted). However, having reviewed the record, we are convinced that "in light of the entire proceedings and given the effect to which the whole record shows it is entitled," State v. Gano, 92 Hawai'i 161, 176, 988 P.2d 1153, 1168 (1999), the erroneous admission of the evidence, and specifically luminol and phenolphthalein test results, was harmless beyond a reasonable doubt.

Fourth, Defendant contends that he was denied a fair trial by trial admission and prosecutorial misuse of false explanations and statements of conduct attributed to him. Prosecutorial suppression of exculpatory evidence violates due process where the evidence is material to guilt or punishment, regardless of the good or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 87 (1963). Exculpatory evidence is "material" where, absent suppression, there is a "reasonable probability" the result of the proceeding would be different.

United States v. Bagley, 473 U.S. 667, 682 (1985). We hold that: (1) there is no "reasonable probability" of a different outcome if Detective Alejo disclosed that he reviewed his notes from the January 6, 1996 questioning with Defendant prior to trial because (a) the circuit court instructed the jurors to disregard the statement, and (b) defense counsel subjected Detective Alejo to cross-examination that indicated the Detective's assertion to be false; (2) there is no "reasonable probability" of a different outcome if Detective Hee disclosed his contact with Connie Fetheran prior to trial because (a) Defendant was permitted to examine Detective Hee about the contact, and (b) Defendant was afforded the opportunity to recall Roger Fleenor and Kyle McCarthy for questioning about the relationship between Roger Fleenor and Johnnie Mae Nuuhiwa; (3) there is no "reasonable probability" that a different result would have occurred if the prosecution disclosed evidence relating to the abortion prior to trial; and (4) Defendant has failed to establish that the raw notes of police officers are discoverable, see State v. Fukusaku, 85 Hawai'i 462, 493-94, 946 P.2d 32, 63-64 (1997).

Fifth, Defendant contends that he was denied a fair trial due to prosecutorial misconduct. Having reviewed the record and transcripts, we hold that: (1) the prosecution's opening statement contained improper speculation and argument; (2) the prosecution's failure to disclose that Dean Yamamoto intended to testify about crime scene reconstruction was not deliberate misconduct; (3) the prosecution's deliberate

elicitation of inadmissible hearsay from Detective Chamberlain constituted prosecutorial misconduct; (4) the prosecution's elicitation of testimony that Edna Schaffer contacted the police in response to a notice was not deliberate misconduct; and (5) the prosecution's statements during closing argument (a) that Defendant had the ability to test the smooth rock but did not do so, and (b) regarding the absence of testimony by Connie Fetheran, were improper.[2] However, having reviewed the record in its entirety, including prompt curative instructions issued by the circuit court, and in light of the strength of the evidence arrayed against Defendant, we hold that the foregoing prosecutorial misconduct did not substantially prejudice Defendant's right to a fair trial.

Finally, Defendant contends that HRS § 706-657 (Supp. 2000) is unconstitutional. This court recently upheld the constitutionality of the enhanced sentencing statute in State v. Peralto, 95 Hawai'i 1, 18 P.3d 203 (2001). However, the circuit court applied an incorrect legal standard in imposing an enhanced sentence. See State v. Young, 93 Hawai'i 224, 999 P.2d 230 (2000); Peralto, 95 Hawai'i at 7, 18 P.3d at 209 (establishing that Young applies retroactively to this case). Accordingly, we

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[2] Because the prosecution's actions may warrant disciplinary action, we refer this case to the Office of Disciplinary Counsel. Accord Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995) (Where attorney's actions "[did] not comport with the precepts embodied in the [Hawai'i Rules of Professional Conduct (HRPC)], we are compelled to refer the supreme court record in this case, as we must pursuant to the Revised Code of Judicial Conduct Canon 3(D)(2) (1992), to the Office of Disciplinary Counsel for its review and appropriate action.") (Footnote omitted.)).

vacate Defendant's enhanced sentence and remand for resentencing. On remand, "[t]he prosecution may elect to conduct a new HRS § 706-657 hearing or may consent to resentencing without the enhancement." Peralto, 95 Hawai'i at 8, 18 P.3d at 210. Therefore,

IT IS HEREBY ORDERED that the circuit court's November 5, 1997 judgment of conviction is affirmed, the enhanced sentence is vacated, and the case is remanded for resentencing.

DATED: Honolulu, Hawai'i, August 31, 2001.

On the briefs:

David Glenn Bettencourt,
for defendant-appellant

Dale Yamada Ross, Deputy
Prosecuting Attorney,
for plaintiff-appellee