IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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STATE OF HAWAI‘I, Plaintiff-Appellee,

vs.

KALAWAIANUI F. CARMICHAEL, Defendant-Appellant.

NO. 22871

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0168)

AUGUST 29, 2002

MOON, C.J., AND NAKAYAMA, J.; RAMIL, J.,
DISSENTING IN PART AND CONCURRING IN PART;
LEVINSON, J., DISSENTING; AND
ACOBA, J., DISSENTING

OPINION BY MOON, C.J., IN WHICH NAKAYAMA, J.,
JOINS; RAMIL, J., CONCURRING IN THE RESULT

Defendant-appellant Kalawaianui F. Carmichael appeals from the September 23, 1999 judgment of conviction and sentence of the Circuit Court of the Second Circuit. Carmichael contends that the circuit court, the Honorable Shackley Raffetto presiding, abused its discretion in denying Carmichael's motion to dismiss a charge of promoting a dangerous drug in the third degree as a de minimis offense. For the following reasons, we affirm both the circuit court's denial of the motion to dismiss and its judgment of conviction and sentence.

I. BACKGROUND

On February 13, 1999, Maui Police Department (MPD) Officer Christopher Horton observed a vehicle driven by Carmichael traveling between 84 and 86 miles per hour on a road with a speed limit of 30 miles per hour. Officer Horton stopped Carmichael's vehicle and spoke to him. Officer Horton detected an odor of alcohol from Carmichael, who slurred his words as he spoke. Carmichael initially admitted to drinking one, then two, beers. Minutes later, Carmichael told Officer Horton that he had drunk "three 40 ounce Mickey's." Carmichael appeared unsteady on his feet, and his field sobriety test revealed other signs of impairment. He was arrested for driving under the influence of intoxicating liquor, in violation of Hawai'i Revised Statutes (HRS) 291-4 (Supp. 1999).[1]

At the Wailuku police station, Carmichael elected to take a breath alcohol test, which revealed an alcohol content of

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[1] HRS § 291-4 states in pertinent part:

> (a) A person commits the offense of driving under the influence of intoxicating liquor if:
> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor, meaning that the person concerned is under the influence of intoxicating liquor in an amount sufficient to impair the person's normal mental faculties or ability to care for oneself and guard against casualty; or
> (2) The person operates or assumes actual physical control of the operation of any vehicle with .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood or .08 or more grams of alcohol per two hundred ten liters of breath.

.096. While "processing" Carmichael, MPD Officer Robert Harley did a pat-down search and recovered from Carmichael's sock: (1) a glass pipe containing a white crystalline substance and a brown, burnt substance; (2) two metal scrapers; (3) a small plastic straw with one end heat-sealed and the other cut at an angle; and (4) several ziplock bags containing "a light rock residue visible to the naked eye."

On April 12, 1999, Carmichael was charged by grand jury indictment with: (1) driving under the influence of intoxicating liquor (Count I); (2) promoting a dangerous drug in the third degree, in violation of HRS § 712-1243 (1993 & Supp. 1999)[2] (Count II); and (3) prohibited acts related to drug paraphernalia, in violation of HRS § 329-43.5(a) (1993)[3] (Count

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[2] HRS § 712-1243 states in pertinent part:

> (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.
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> . . . .
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> (3) Notwithstanding any law to the contrary, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

[3] HRS § 329-43.5(a) states in pertinent part:

> 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

(continued...)

III). On June 4, 1999, Carmichael filed a motion to dismiss Count II of the indictment, claiming that his alleged violation of HRS § 714-1243 constituted a de minimis infraction, pursuant to HRS § 702-236 (1993).[4]

A hearing on Carmichael's motion was held on December 27, 1999. Both parties stipulated that Julie Wood, an expert in the field of drug identification, tested the evidence recovered from Carmichael. The parties stipulated that Wood's testimony would have been that the substance tested in the instant case was visible to the naked eye, and the parties agreed to admit into evidence a lab report prepared by Wood. Wood's lab report indicated that .002 grams of a substance containing

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[3](...continued)

otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

[4] HRS § 702-236 provides in pertinent part:

> (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:
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> (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; or
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> (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
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> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

methamphetamine was recovered from the glass pipe taken from Carmichael. The report also indicated that the white residue on the plastic straw and in the ziplock bags was of an insufficient amount for analysis.

The defense called George W. Read, Ph.D., Emeritus Professor of Pharmacology at the University of Hawai‘i. Dr. Read was qualified as an expert in the field of pharmacology, "the study of actions of drugs in an organism, especially man, humans." He testified that methamphetamine is a central nervous system (CNS) stimulant that has been medically accepted for use in the treatment of obesity, narcolepsy, attention deficit hyperactive disorder (ADHD), and fatigue.[5] The defense offered into evidence[6] a chart, prepared by Dr. Read, indicating that the ranges of methamphetamine dosages used to treat obesity, narcolepsy, ADHD, and fatigue are: .01 to .04 grams; .005 to .06 grams; .005 to .015 grams; and .01 to .04 grams, respectively. Dr. Read testified that the doses indicated on his chart were based upon pure methamphetamine taken orally in pill form. He also testified that at least one manufacturer makes .0025 gram tablets of methamphetamine to treat ADHD in children.

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[5] Dr. Read described the use of methamphetamine to treat fatigue as "a borderline acceptable use."

[6] Although not reflected on the Exhibit list, the transcript of the hearing indicates that the chart was admitted into evidence without objection.

With respect to the abuse of methamphetamine, Dr. Read testified that a "naive user," that is, one who had not developed a tolerance for methamphetamine, would use between .05 and .1 grams to achieve a feeling of "euphoria and elation." Dr. Read referred to an amount of methamphetamine used to achieve euphoria and elation as a "street dose," an "illicit use dose," and an "illicit dose." He also noted that researchers in one of the studies he reviewed had used .03 grams of methamphetamine for a 70 kilogram person as "the low end of the street dose." Dr. Read concluded that .002 grams of methamphetamine[7] would not be saleable, would not be effective as an illicit dose, and would not produce a pharmacological effect. Dr. Read further testified that residue recovered from a pipe "is going to be almost all inert material with very little drug."

On cross-examination, Dr. Read explained that inhaling a drug will result in a greater effect with a smaller dose than ingesting the same drug orally. Dr. Read also stated that he had neither met nor examined Carmichael and indicated that he did not know if Carmichael had a history of drug use.

The circuit court inquired as to how alcohol in Carmichael's system would interact with methamphetamine. Specifically, the court asked:

[7] Dr. Read's conclusions were expressed in response to questions by defense counsel; however, it is not clear whether defense counsel's references to ".002 grams" pertained to the substance recovered in the instant case or pure methamphetamine.

> The evidence here is that as I understand it from the memorand[a] is [Carmichael] was arrested for driving under the influence of alcohol, told the police he was driving his car at an excessive speed, told the policeman he drank three, forty-ounce Mickeys, and when he got to the police station they gave him a breath test and had, I think .096 blood alcohol content. That will affect the effect the ingestion of methamphetamine would have on a person, would it not?

Dr. Read stated that alcohol and methamphetamine would work in opposition to each other and, if anything, the methamphetamine "would have made him more alert and less drunk than he would appear with the alcohol alone" and that, "in his behavior to the arresting cop, he would have appeared slightly less drunk with the CNS stimulant in his system." Upon further questioning by the prosecution, Dr. Read indicated that methamphetamine use would not affect the rate of elimination of alcohol from the human body in any manner.

MPD Officer Michael Callinan, assigned to the vice and narcotics division, testified for the prosecution. Officer Callinan identified the pipe recovered from Carmichael as one used to smoke crystal methamphetamine. He indicated that methamphetamine is usually loaded into the ball end of the pipe with a cut straw. The ball end of the pipe is then heated with an open flame, and the user inhales the methamphetamine from the cylindrical end of the pipe. Officer Callinan explained that the plastic straw recovered from Carmichael was of the type used to load methamphetamine into a pipe for use or to load the drug into smaller packets for distribution. With respect to the metal

scrapers, he also testified that a user who "is low on their product" will sometimes "scrape the residue into a grouping or small bunch, and then . . . resmoke the residue."

In their arguments, both the defense and the prosecution focused on the amount of methamphetamine recovered in the instant case. The defense argued, inter alia, that Count II of the indictment should be dismissed as a de minimis infraction because "the .002 grams containing methamphetamine has no pharmacological effect according to Doctor George Read. Therefore, the Court should find this amount is unusable for use or sale and falls within the purview of the language of State v. Vance." Based upon Dr. Read's testimony that .002 grams was a measurable amount and Officer Callinan's testimony regarding the practice of "scraping the inside of the glass pipe in order to heat residue and smoke it," the prosecution argued that a useable amount of methamphetamine was recovered from Carmichael.

The circuit court denied Carmichael's motion to dismiss, noting:

> We know that the Vance case was talking about cocaine, for which there's no mandatory sentencing. We do know the legislature in addition to prohibiting possession of any amount of drug, methamphetamine, in fact requires mandatory jail terms for possession of this particular drug, so it reemphasized its intent that this is a serious drug and that the potential for harm to our society is very high.
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> In this case the amount that was -- well, let me take a step. I think the de minimis standard is essentially intended for a situation such as where a person borrows the car of another person and then they are arrested and they find some small amount of drugs in the ashtray or something like that, or circumstances that don't indicate the person was actively smoking, or ingesting the drug or using the drug.

> Not that it is just -- I don't think it is intended to provide a bright line for a certain amount, and also it is apparent that even the Supreme Court is using the wrong terminology, that is to say the word narcotic. Apparently, that's not appropriate for use with the drug methamphetamine. I am interpreting that to mean any effects on the central nervous system.
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> The expert talked about, well, what he means street use, how much does it take to get a person high, which is problematical, because you have all these variables, what their tolerance might be, how much they weigh, how pure it is. We know, for instance, that a therapeutic amount is as low as .0025, and apparently pills are available in that amount for treatment for attention deficit disorder, so it is hard to say .002 is just not meant to be concerned about when we're talking about methamphetamine, and I think I have to take into consideration the circumstances here.
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> What is in evidence is that this was a pipe which is commonly used for smoking methamphetamine, that residue in a pipe can be commonly used by people to smoke methamphetamine, and I just don't feel in the totality of the circumstances of this case that I should exercise discretion of the Court and find that this was a de minimus [sic] infraction, so I am going to deny the motion.

A written order denying Carmichael's motion to dismiss was filed on July 23, 1999.

On July 29, 1999, Carmichael withdrew his plea of not guilty and entered pleas of no contest to Count I and Count III. With respect to Count II, Carmichael entered a conditional plea of no contest, reserving his right to appeal the issues in this case. The court accepted his pleas and, on September 23, 1999, sentenced Carmichael to, inter alia, imprisonment for five days and a 90-day suspension of his driver's license for Count I; a five-year term of imprisonment with a 30-day mandatory minimum term for Count II; and a five-year term of imprisonment for Count III. All terms were to run concurrently. On October 4, 1999, Carmichael timely filed a notice of appeal.

II. STANDARDS OF REVIEW

Before a trial court can address whether to dismiss a prosecution on de minimis grounds, it must first make factual determinations regarding both the conduct alleged and the attendant circumstances, which are reviewed under the clearly erroneous standard. State v. Viernes, 92 Hawai‘i 130, 133, 988 P.2d 195, 198 (1999) (citations omitted). A trial court's decision under HRS § 702-236, governing de minimis infractions, is reviewed for an abuse of discretion. Id.

III. DISCUSSION

At the outset, we note that our plurality decision in this case is consistent with the decision and analysis in Viernes. See id. at 135, 988 P.2d at 200. Additionally, we note that Carmichael raises no challenge regarding Counts I and III. Therefore, we leave the judgment of conviction and sentence for these counts undisturbed. Additionally, Carmichael does not challenge any of the circuit court's findings of fact. Thus, this court may accept the circuit court's findings as the operative facts of the case. See Robert's Hawai‘i School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai‘i 224, 239, 982 P.2d 853, 868 (1999) (citation omitted); but cf. Hawai‘i Rules of Appellate Procedure Rule 28(b)(4) (2000) (an appellate court, at its option, may notice a plain error not presented).

In the present case, the police recovered from Carmichael: one glass pipe used to smoke methamphetamine; one plastic straw with one end heat-sealed and the other end cut at an angle, which, according to the testimony, is typically used to load crystal methamphetamine into a pipe for use and to load the drug into smaller packets for distribution; two metal scrapers typically used to scrape residue from a pipe in order to resmoke it; and several ziplock bags of various sizes, each containing a white residue. Additionally, the court noted that Carmichael was driving at an excessive speed immediately prior to being pulled over by the police and that he had a breath alcohol content of .096. Further, Carmichael's field sobriety test suggested that he was impaired.

As the party advancing the motion to dismiss on de minimis grounds, the defendant bears the burden of establishing that the alleged conduct constituted a de minimis infraction. See generally State v. Balanza, 93 Hawai‘i 279, 283-85, 1 P.3d 281, 285-87 (2000). Thus, the defendant must adduce evidence regarding both the conduct alleged and the attendant circumstances in order to support a finding that the alleged conduct was de minimis. However, both at the hearing and on appeal, the defense focused on whether the amount of the drug possessed constituted a useable amount. The record indicates that the defense did not adduce any evidence or present any

argument with respect to the attendant circumstances, including: (1) Carmichael's possession of multiple items associated with the use and distribution of methamphetamine; (2) his driving at excessive speed immediately prior to being apprehended; and (3) the arresting officer's determination that Carmichael appeared impaired. By failing to address these attendant circumstances, the defense failed to meet its burden of providing evidence to support a finding that the conduct alleged "did not actually cause or threaten the harm or evil sought to be prevented by [HRS § 712-1243] or did so only to an extent too trivial to warrant the condemnation of conviction."[8] See HRS § 702-236. Given the inadequate record presented by the defense, the circuit court did not clearly err when it found, based upon its expressed consideration of "the totality of the circumstances of this case[,]" that Carmichael's alleged conduct did not constitute a de minimis infraction.[9] See State v. Sanford, 97 Hawai'i 247, 256, 35 P.3d 764, 773 (App.) (upholding the circuit court's denial of a motion to dismiss a charge as de minimis based upon, inter alia, "the juxtaposition of drug repositories,

[8] When the attendant circumstances so warrant, we believe dismissal of a charge of promoting a dangerous drug in the third degree as a de minimis offense is consistent with the intent of the legislature. For example, in a case where the evidence demonstrates that a defendant had knowingly recovered a quantity of methamphetamine with the intent to deliver it to the police as evidence of a crime when he was arrested and charged for possessing "any amount" of a dangerous drug, dismissal as a de minimis offense would clearly be warranted. Therefore, we respectfully disagree with Justice Ramil.

[9] We respectfully disagree with Justice Acoba's characterization of our analysis and disagree with his opinion generally.

smoking device and smoked residue, and especially the possession of such depleted drug contraband by one engaged in shoplifting"), cert. denied, 97 Hawai'i 247, 35 P.3d 764 (2001). Accordingly, the circuit court did not abuse its discretion in denying the motion to dismiss.

IV. CONCLUSION

For the foregoing reasons, we affirm the order denying Carmichael's motion to dismiss and the judgment of conviction and sentence of the circuit court.

On the briefs:

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