FOR PUBLICATION IN WEST'S HAWAIʻI REPORTS AND PACIFIC REPORTER

Electronically Filed
Supreme Court
SCWC-29703
22-MAR-2013
08:41 AM

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

CHESTER PACQUING, Petitioner/Defendant-Appellant.

SCWC-29703

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29703; CR. NO. 08-1-0556)

MARCH 22, 2013

RECKTENWALD, C.J., NAKAYAMA, AND McKENNA, JJ.,
AND CIRCUIT JUDGE BROWNING, ASSIGNED BY
REASON OF VACANCY, WITH ACOBA, J., DISSENTING

OPINION OF THE COURT BY RECKTENWALD, C.J.

Chester Pacquing was charged with one count of Unauthorized Possession of Confidential Personal Information (UPCPI) in relation to two traffic stops in which he identified

himself to a police officer using the name, date of birth, and address of his former neighbor, the Complainant in this case.

Pacquing moved to dismiss the charge as a de minimis violation of the UPCPI statute, on the ground that his conduct did not actually cause or threaten the harm sought to be prevented by the statute, or did so only to a trivial extent. See Hawaiʻi Revised Statutes (HRS) § 702-236(b). In support of his argument, Pacquing relied primarily on factors set forth by this court in State v. Park, 55 Haw. 610, 617, 525 P.2d 586, 591 (1974).

The Circuit Court of the First Circuit granted Pacquing's motion and dismissed the charge, without prejudice to the State charging Pacquing with the offense of Unsworn Falsification to Authorities.[1] The State appealed, and the ICA vacated the circuit court's dismissal order on the ground that the circuit court had not been presented with all of the relevant circumstances surrounding the offense as required under this court's holding in State v. Rapozo, 123 Hawaiʻi 329, 235 P.3d 325 (2010). Specifically, the ICA noted that the circuit court was not aware that Pacquing was in possession of Complainant's driver's license number and partial social security number, which were contained on the citation Pacquing received at the initial

[1] The Honorable Michael A. Town presided.

traffic stop. Accordingly, the ICA remanded to permit the circuit court to consider "all the relevant circumstances."

Pacquing argues that the ICA erred in concluding that the circuit court was not presented with all of the relevant circumstances. He further argues the circuit court did not abuse its discretion in granting his motion to dismiss. Accordingly, Pacquing seeks to affirm the circuit court's dismissal order.

We conclude that Pacquing's arguments are without merit. Accordingly, we agree with the ICA that the dismissal order must be vacated, and the case remanded for further proceedings. However, while we reach the same result as the ICA, our reasoning differs. Specifically, we do not find the information regarding Complainant's driver's license number and partial social security number to be dispositive. Rather, we conclude that the circuit court abused its discretion in concluding that Pacquing's conduct constituted a de minimis violation of the UPCPI statute because, as set forth below, Pacquing's conduct actually caused or threatened the harm sought to be prevented by the UPCPI statute, and Pacquing failed to meet his burden of demonstrating the results of his conduct were trivial. See HRS § 702-236(b). We therefore affirm the ICA's judgment.

I. Background

A. Factual history

The following facts are taken from the submissions of the parties to the circuit court, and are undisputed.

On March 23, 2008, at approximately 11:00 p.m., Honolulu Police Department (HPD) Officer Barry Danielson observed a black Acura Integra being operated with an expired vehicle tax emblem. Officer Danielson initiated a traffic stop and pulled the vehicle over near the intersection of North King Street and Kalihi Street. Officer Darrin Lum arrived to assist Officer Danielson.

Officer Lum observed Pacquing in the driver's seat of the vehicle. He asked for Pacquing's license, registration, and proof of no-fault insurance. Pacquing was unable to produce the requested documents, but identified himself as Complainant. Pacquing also gave a date of birth and residential address.

Officer Lum proceeded to verify the information Pacquing provided. Dispatch informed Officer Lum that the Department of Motor Vehicles Licensing Division (DMV) had a record of Complainant with the date of birth and address given by Pacquing. Dispatch also provided Officer Lum with a description of Complainant from the DMV, which also matched Pacquing.

Officer Lum issued two citations in Complainant's name: one criminal citation for the offense of Driving Without Insurance, and one infraction citation for the offenses of

Delinquent Vehicle Tax and Fraudulent Safety Check. Pacquing signed both citations with Complainant's name.

Officer Lum later discovered that, although he gave Pacquing a copy of the criminal citation, he did not give him a copy of the infraction citation. Officer Lum proceeded to the address Pacquing had provided to deliver the citation. When no one answered the door, Officer Lum left the infraction citation in the mailbox.

On March 24, 2008, Complainant went to the Kalihi Police Station and informed the police that he had found the citation in his mailbox and believed it to be in error. Complainant stated that he did not own or operate the black Acura Integra listed on the citation, nor was he involved in a traffic stop at the time listed on the citation. HPD Officer Tish Taniguchi initiated a police report, and relayed the information to Officer Lum.

On April 7, 2008, Officer Danielson again initiated a traffic stop on the same black Acura Integra. Officer Lum again arrived to assist. Officer Danielson observed Pacquing in the driver's seat, and asked for his license, registration, and proof of no-fault insurance. Pacquing stated that he did not have any picture identification, but that he recently received a citation for the same violation. Pacquing presented Officer Danielson with the March 23, 2008 criminal citation issued by Officer Lum.

Officer Lum asked Pacquing to exit the vehicle and sit in Officer Lum's HPD issued vehicle. Officer Lum asked another officer to locate Complainant and escort Complainant to the scene. Complainant arrived at the scene at approximately 3:00 a.m., and identified the defendant as "Chester Pacquing." Complainant related that Pacquing used to be his neighbor, and that Pacquing did not have permission to use any of Complainant's personal information.

Officer Lum asked Pacquing if his name was "Chester Pacquing." Pacquing responded in the affirmative, and stated that he was scared because he "had some warrants and did not want to get arrested." Pacquing acknowledged that he used to live near Complainant. Officer Lum then placed Pacquing under arrest.

B. Circuit court proceedings

On April 14, 2008, Pacquing was charged by way of complaint with one count of UPCPI, in violation of HRS § 708-839.55,[2] in relation to his possession of Complainant's

---

[2] HRS § 708-839.55 (Supp. 2006) provides:

> (1) A person commits the offense of unauthorized possession of confidential personal information if that person intentionally or knowingly possesses, without authorization, any confidential personal information of another in any form, including but not limited to mail, physical documents, identification cards, or information stored in digital form.
>
> (2) It is an affirmative defense that the person who possessed the confidential personal information of another did so under the reasonable belief that the person in possession was authorized by law or by the consent of the other person to possess the confidential personal information.

(continued...)

confidential personal information[3] on or about March 23, 2008, to and including April 7, 2008.

On September 2, 2008, Pacquing filed a Motion to Dismiss, or in the Alternative, Motion for Bill of Particulars. In a supplemental memorandum to the motion, Pacquing argued that the charge should be dismissed because the State could not prove he was in possession of Complainant's confidential personal information, since the information came from Pacquing's memory and was possessed only in his mind. Pacquing asserted that he was possibly guilty of "some degree of Identity Theft," but not UPCPI. Pacquing also acknowledged that he possessed Complainant's confidential personal information on April 7, 2008 in the form of the citation, but argued that "[t]he fact that it was memorialized on a piece of paper and given to [Pacquing] does not change a thing." With regard to his alternative motion for a bill of particulars, Pacquing sought clarification as to whether the date of the offense was March 23, 2008 or April 7, 2008. The

---

[2](...continued)

(3) Unauthorized possession of confidential personal information is a class C felony.

[3] "Confidential personal information" is defined as:

> information in which an individual has a significant privacy interest, including but not limited to a driver's license number, a social security number, an identifying number of a depository account, a bank account number, a password or other information that is used for accessing information, or any other name, number, or code that is used, alone or in conjunction with other information, to confirm the identity of a person.

HRS § 708-800 (Supp. 2006) (emphasis added).

circuit court ultimately denied the motion, and Pacquing does not challenge this ruling on appeal.

On October 6, 2008, Pacquing filed a Motion to Dismiss for De Minimis Violation, which is the subject of the instant appeal. Along with the motion, Pacquing submitted a declaration of counsel, which acknowledged that Pacquing was pulled over on March 23, 2008 and April 7, 2008; that on the first occasion, he provided officers with Complainant's name, date of birth and address; and that on the second occasion, he presented officers with the citation he had previously received.

Pacquing asserted that his conduct constituted a de minimis infraction under the factors set forth in Park.[4] Pacquing argued that, rather than the offense of UPCPI, "the

---

[4] Park involved charges against several political candidates for failing to timely file campaign expense reports. 55 Haw. at 611, 525 P.2d at 588. This court stated that the factors to be taken into account in consideration of a de minimis motion "should include":

> the background, experience and character of these defendants-appellees which may indicate whether they knew of, or ought to have known, the requirements of [the law requiring filing of campaign expense statements]; the knowledge on the part of these defendants-appellees of the consequences to be incurred by them upon the violation of the statute; the circumstances concerning the late filing of these statements of expense; the resulting harm or evil, if any, caused or threatened by these infractions; the probable impact of these violations upon the community; the serious[n]ess of the infractions in terms of the punishment, bearing in mind, of course, that the punishment can be suspended in proper cases; the mitigating circumstances, if any, as to each offender; the possible improper motives of the complainant or the prosecutor; and any other data which may reveal the nature and degree of the culpability in the offense committed by each defendant-appellee.

Id. at 617, 525 P.2d at 591.

likely assumption would be that he was committing identity theft or violating some duty to not mislead a police officer[,]" such as Unsworn Falsification to Authorities in violation of HRS § 710-1063.[5] Thus, Pacquing argued that "it should be assumed that [he] envisioned the consequences of his actions to be a violation of HRS § 710-1063(1)(b)" and Unsworn Falsification to Authorities was therefore the proper charge. In addition, Pacquing argued that the circumstances surrounding the offense, the resulting harm or evil, and the probable impact on the community were minimal because Complainant immediately informed the police that he was not involved in the traffic stop, and the police believed Complainant. Finally, although Pacquing appeared to concede that the State did not have improper motives in charging him with UPCPI, he argued that his conduct "did not rise to the level of a felony offense[,]" and that he therefore had been over-charged. Pacquing reiterated his argument that the proper charge for his conduct was the misdemeanor offense of Unsworn Falsification to Authorities.

---

[5] HRS § 710-1063 (1993) provides in relevant part:

> (1) A person commits the offense of unsworn falsification to authorities if, with an intent to mislead a public servant in the performance of the public servant's duty, the person:
> . . .
> (b) Submits or invites reliance on any writing which the person knows to be falsely made, completed, or altered[.]
> . . . .
> (2) Unsworn falsification to authorities is a misdemeanor.

Pacquing also argued that his conduct constituted a de minimis violation under the applicable statute, HRS § 702-236(1)(b) and/or (c).[6] Specifically, Pacquing argued that the legislature did not intend to prevent his conduct under UPCPI, but rather under Unsworn Falsification to Authorities. He also argued that a conviction for UPCPI would be unduly harsh.

The State filed a response to Pacquing's motion, setting forth facts substantially similar to those set forth above, but with somewhat more detail than was set forth in Pacquing's declaration of counsel. For example, the State asserted that Complainant informed the officers that Pacquing "used to be his neighbor[.]" The State also asserted that, upon being arrested, Pacquing informed the officers that he "was scared because [he] had some warrants and did not want to get arrested."

---

[6] HRS § 702-236 (1993) provides in relevant 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:
>
> (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
>
> (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.

The State argued that Pacquing's conduct implicated the purpose of the UPCPI statute which, according to the State, was to "prohibit the intentional or knowing possession of the confidential personal information of another person, without authorization, in any form." The State further argued that Pacquing's conduct caused the harm or evil sought to be prevented by the UPCPI statute, and was not trivial, because "[h]ad [Pacquing] not been caught, Complainant would have suffered repercussions of two unjustified traffic citations." Finally, the State argued that Pacquing's conduct was "envisaged by the legislature in forbidding the offense" because the language of the statute "unquestionably proscribes [Pacquing's] conduct."

The circuit court held a hearing on Pacquing's motion on October 30, 2008, at which the parties generally reiterated the arguments set forth in their briefs and the court took the matter under advisement. On February 11, 2009, the circuit court filed its order granting Pacquing's motion to dismiss. The circuit court dismissed the complaint without prejudice to the State charging Pacquing with Unsworn Falsification to Authorities within 90 days. The circuit court's findings of fact generally repeated the facts set forth above. The circuit court entered the following relevant conclusions of law:

> 2. The decision to dismiss a prosecution based upon it being a de minimis infraction is one made by the court. The Hawaii Supreme Court has adopted a "totality of the circumstances" test for determining whether an offense is to be treated as a de minimis

infraction. State v. Park, 55 Haw. 610, 525 P.2d 586 (1974).

3. As stated in Park, the following factors should be considered in determining whether to dismiss a charge as de minimis:

a. The background, experience and character of the defendant which may indicate whether the defendant knew of, or ought to have known of the requirements of the law;
b. The knowledge on the part of the defendant of the consequences to be incurred upon a violation of the statute;
c. The circumstances concerning the offense[;]
d. The resulting harm or evil, if any, caused or threatened by the infractions;
e. The probable impact of the violation upon the community;
f. The seriousness of the infraction in terms of the punishment, bearing in mind that the punishment can be suspended in proper cases (but in felony cases, suspended sentence is not an authorized disposition under HRS § 706-605);
g. The mitigating circumstances, if any, as to the offender;
h. The possible improper motives of the complainant or the prosecutor;
i. Any other data which may reveal the nature and degree of the culpability in the offense committed.

4. The consequences of the first two Park factors, assuming [Pacquing] knew the requirements of the law, and therefore knew he should not have given another person's information as his own, the logical conclusion would be that he was committing some form of identity theft or violating a duty to not mislead a police officer.

5. With all due regard to the discretion of the Prosecuting Attorney's Office, the proper charge in this case exists pursuant to HRS § 710-1063, Unsworn Falsification to Authorities . . . .

6. HRS § 710-1063 is a consequence that a person in [Pacquing's] position could reasonably expect to incur.

7. The circumstances surrounding the offense charged, the resulting harm or evil in this case, and the probable impact upon the community, are minimal. The police immediately believed the Complainant . . . when he informed them that he did not own a black Acura and he did not get pulled over on March 23, 2008. [Complainant] did not have to appear in traffic court and did not incur any traffic violations as a result of [Pacquing's] conduct. This minimal result does not

> warrant a felony charge for [Pacquing], or worse, a felony conviction.
>
> 8. The punishment in this case, a felony conviction for [Pacquing], and a potential five-year term of incarceration, is too serious and too harsh. [Pacquing's] actions did not rise to the level of a felony offense. Again, [Pacquing's] conduct may constitute a misdemeanor pursuant to HRS § 710-1063(1)(b).
>
> 9. [Pacquing], being only 24 years old, is a mitigating circumstance in his favor. The non-violent nature of this offense, and [Pacquing's] history of non-violence, are also mitigating factors.
>
> 10. The [c]ourt is also concerned that [Pacquing] has been over-charged and his misdemeanor conduct was pidgeon-holed [sic] into a felony statute.
>
> 11. [Pacquing's] conduct caused harm only to a minimal extent, and certainly not serious enough to warrant a felony conviction.
>
> 12. [Pacquing's] conduct also does not fall within that which was envisioned by the legislature in forbidding the charged offense.
>
> 13. [Pacquing's] conduct was meant to be prohibited by HRS § 710-1063(1)(b), Unsworn Falsification to Authorities.
>
> 14. The harshness of a conviction is a factor when determining whether a charge should be dismissed under HRS § 702-236. State v. Vance, 61 Haw. 291, 602 P.2d 933 (1979). In the instant case, a conviction for [Pacquing] could result in an indeterminate five-year term of imprisonment.
>
> 15. [Pacquing's] conduct constitutes a de minimis infraction within the meaning of HRS § 702-236.

The State timely filed a notice of appeal on March 12, 2009.

The parties subsequently appeared before the circuit court on a motion for revocation and sentencing in two unrelated criminal cases involving Pacquing, Cr. Nos. 05-1-1548 and 08-1-1492. At the hearing, Pacquing's counsel raised a "housekeeping

matter" in relation to the instant case, and the following exchange occurred:

> [DEFENSE COUNSEL]: . . . . [F]or the de minimis motion we didn't take testimony, Your Honor, but [the deputy prosecuting attorney (DPA)] and I agreed now kind of retroactively to stipulate to the facts that were laid out in both of our memoranda, if that's okay.
>
> THE COURT: That's not on the calendar so what am I supposed to do, just make a decision?
>
> [DEFENSE COUNSEL]: Well, my appellate section is telling me that there may not actually be a record of fact because we agreed. Since we didn't take any testimony we kind of agreed to the facts. But in case we didn't mention it at the motion, we just wanted to agree to the facts.
>
> THE COURT: To do that I need to call the case and place that stipulation on the record and have him agree that he doesn't need to cross-examine anybody[.]
>
> [DEFENSE COUNSEL]: Oh, that's -- that's fine, Your Honor, I'll address it with my appellate.
>
> THE COURT: So am I making a record today or not?
>
> [DEFENSE COUNSEL]: I -- I don't think -- I mean, I'm not sure. I don't want to speak for [the DPA].
>
> [DPA]: Well, my understanding is that back then, I am pretty sure that both sides already stipulated to the facts that were in the respective memorandum [sic], there are no material differences in the recollection of the facts. However, just to supplant that, I'll make sure that it is a stipulation. I think that we're both in agreement that those facts should be made part of the record even if they weren't made part of the record back then.

The circuit court proceeded to call the instant case, Cr. No. 08-1-0556, and asked defense counsel and Pacquing, "You've made the record that there's a stipulation there, you're making it part of the record, and your client is waving any

cross-examination?" Both defense counsel and Pacquing agreed, and the proceedings were then concluded.

C. Appeal

On appeal, the State argued that the circuit court abused its discretion in granting Pacquing's motion to dismiss. Specifically, the State challenged the circuit court's apparent conclusion that UPCPI was not the proper charge for Pacquing's conduct. The State also challenged the circuit court's conclusions that the impact of Pacquing's conduct was minimal, the punishment for UPCPI was "too harsh," and Pacquing's youth and lack of a violent criminal history were mitigating factors. The State specifically challenged the circuit court's conclusions of law numbered 4 through 15.

Pacquing argued that the circuit court did not abuse its discretion in granting the motion to dismiss because Pacquing's conduct did not cause or threaten the harm or evil sought to be prevented by UPCPI. Pacquing asserted that UPCPI was designed to prevent "identity theft-related crimes, which cause[] monetary loss to victims[.]" Pacquing also argued that the circuit court's application of the Park factors to the facts of this case was correct.

On May 27, 2010, approximately ten months after the filing of its opening brief, the State filed a motion to supplement the record on appeal with the transcript of a

preliminary hearing held on April 11, 2008.[7] In the transcript of the preliminary hearing, Officer Lum testified regarding his encounters with Pacquing on March 23, 2008 and April 7, 2008. In addition to the facts set forth supra, Officer Lum testified that he wrote Complainant's driver's license number and the last four digits of his social security number on the citation he gave to Pacquing on March 23, 2008.

Pacquing did not file a response to the State's motion to supplement the record, and the ICA approved the motion and ordered that the record be supplemented. Pacquing subsequently filed a motion for reconsideration, in which he argued that it was not appropriate for the ICA to consider the transcript because (1) the transcript was not before the circuit court, (2) the contents of the transcript had not been received into evidence, and (3) the testimony from the preliminary hearing was not considered by the circuit court in ruling on Pacquing's motion to dismiss. The ICA denied Pacquing's motion for reconsideration.

In a Memorandum Opinion, the ICA vacated the circuit court's dismissal order and remanded for further proceedings. The ICA concluded that the circuit court "was not presented with all the relevant circumstances necessary for it to properly exercise its discretion in rendering the decision[,]" as required

[7] The Honorable Russel S. Nagata presided over the preliminary hearing.

under this court's opinion in Rapozo. Specifically, the ICA noted that neither party cited the preliminary hearing testimony in connection with Pacquing's de minimis motion or introduced the citations issued to Pacquing in Complainant's name.[8] The ICA concluded:

> Evidence that Pacquing possessed and used Complainant's driver's license number and the last four digits of Complainant's social security number constitutes evidence of relevant circumstances pertaining to the charged offense. If the Circuit Court had considered such evidence, it may have affected the Circuit Court's analysis. For example, Pacquing argues that because information regarding a person's name, birth date, and address is easily obtainable through lawful means, Complainant did not have a significant privacy interest in such information. The same argument would not apply to Complainant's driver's license number or the last four digits of Complainant's social security number.

The ICA filed its judgment on February 23, 2012. Pacquing timely filed an application for a writ of certiorari. The State did not file a response.

II. Standard of Review

We review a trial court's ruling on a motion to dismiss for de minimis violation for abuse of discretion. State v. Rapozo, 123 Hawaiʻi 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

[8] The ICA concluded that the circuit court had not considered all of the relevant circumstances because it was not presented with the preliminary hearing transcript, which indicated that the citation Pacquing presented to the officers on April 7, 2008 contained Complainant's driver's license number and a partial social security number. Pacquing argues that the preliminary hearing transcript was irrelevant because the circuit court's decision was not based on the type of confidential personal information in Pacquing's possession. We do not consider the preliminary hearing transcript in reaching our conclusion.

substantial detriment of a party litigant. Id. (citation omitted).

III. Discussion

A. Pacquing's conduct did not constitute a de minimis violation of the UPCPI statute

HRS § 702-236(1) addresses the circumstances in which a prosecution may be dismissed as de minimis, and provides in relevant 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:
>
> . . .
>
> (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[.]

This court has explained that the statute requires "that all of the relevant attendant circumstances be considered by the trial court." Rapozo, 123 Hawaiʻi at 337-38, 235 P.3d at 333-34. The defendant bears the burden of bringing these circumstances before the court for its consideration. See, e.g., id.; State v. Oughterson, 99 Hawaiʻi 244, 256, 54 P.3d 415, 427 (2002) ("[I]nsofar 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.") (emphasis in original). The defendant also bears the burden of establishing why dismissal of the charge as a de minimis infraction is warranted in light of those circumstances. Rapozo,

123 Hawaiʻi at 331, 235 P.3d at 327. For the reasons set forth below, the circuit court abused its discretion in granting the de minimis motion because Pacquing's conduct caused or threatened the harm or evil sought to be prevented by HRS § 708-839.55, and Pacquing did not establish that his conduct was too trivial to warrant the condemnation of conviction.[9] See HRS § 702-236(1)(b).

1. Pacquing's conduct caused or threatened the harm or evil sought to be prevented by HRS § 708-839.55

Pacquing argues that his conduct did not cause or threaten the harm or evil sought to be prevented by the UPCPI statute because, Pacquing asserts, "[t]he statute sought to deter identity theft-related crimes, which cause monetary loss to victims[.]" Pacquing asserts that he did not possess Complainant's confidential personal information with the intent to commit identity theft, but rather to avoid arrest on outstanding warrants. As set forth below, Pacquing's argument is without merit because the legislative history behind the UPCPI

[9] In Park, this court outlined several factors which trial courts should consider in determining whether to dismiss a charge as a de minimis infraction. 55 Haw. at 617, 525 P.2d at 591; see also supra note 4. Although this court has subsequently referenced the Park factors, see e.g., Rapozo, 123 Hawaiʻi at 344, 235 P.3d at 340, it has not expressly applied all of these factors in determining whether a trial court properly granted or denied a motion to dismiss a charge as a de minimis infraction, see, e.g., id.; State v. Viernes, 92 Hawaiʻi 130, 134-35, 988 P.2d 195, 199-200 (1999). Rather, our analysis has relied primarily on the language of the statute, and has considered the Park factors as appropriate to the circumstances of each case. See, e.g., Rapozo, 123 Hawaiʻi at 344, 235 P.3d at 340. Thus, while we do not "de-emphasize" the factors set forth in Park, see dissenting opinion at 24, we consider these factors in light of the requirements set forth in the de minimis statute, as we have done consistently in our prior cases.

statute indicates that it was intended to deter a broader range of conduct than "identity theft-related crimes."

As with all efforts to determine legislative intent, our inquiry into the harm or evil sought to be prevented by a statute relies primarily on the plain language of the statute itself. Rapozo, 123 Hawaiʻi at 338, 235 P.3d at 334. As stated, HRS § 708-839.55 proscribes "intentionally or knowingly possess[ing], without authorization, any confidential personal information of another in any form, including but not limited to mail, physical documents, identification cards, or information stored in digital form."[10] Although the statute describes the conduct it proscribes, the resulting harm or evil the statute seeks to prevent is not immediately apparent. Accordingly, we must look to legislative history to determine the harm or evil sought to be prevented by HRS § 708-839.55. See First Ins. Co. of Hawaii v. A&B Props., 126 Hawaiʻi 406, 415, 271 P.3d 1165, 1174 (2012) (noting that courts may look to legislative history to determine "the reason and spirit of the law").

The UPCPI statute originated from Act 65 of the 2005 legislative session. 2005 Haw. Sess. Laws Act 65, §§ 1-2 at 146-47; see also Hawaii Anti-Phishing Task Force, Report on

[10] The dissent concludes that Pacquing did not "possess" Complainant's confidential personal information because the information was not recorded in writing or digitally. Dissenting opinion at 48-49. However, Pacquing does not raise this argument on appeal. Moreover, this conclusion is contrary to the statutory language, which prohibits the unauthorized possession of confidential personal information "in any form[.]" HRS § 708-839.55 (emphasis added).

Electronic Commerce-Based Crimes (2006) (hereinafter "Anti-Phishing Task Force Report"). Through Act 65, the legislature established a "Hawaii anti-phishing task force to develop state policy on how best to prevent further occurrences of phishing and other forms of electronic commerce-based crimes in the State." 2005 Haw. Sess. Laws Act 65, §§ 1-2 at 147. The legislature explained that, "in phishing scams, Internet scammers try to get information, such as credit card numbers, passwords, account information, or other personal information, by convincing Internet users to divulge the information under false pretenses." Id., § 1 at 147.

Pursuant to Act 65, the task force submitted a report with findings and recommendations to the 2006 legislature. Anti-Phishing Task Force Report; see also 2005 Haw. Sess. Laws Act 65, § 2(d) at 148. Recognizing that "phishing is a relatively small part of the identity theft problem[,]" the report addressed "crimes and scams under the broader category of 'identity theft' and those offenses committed as precursors to identity theft." Anti-Phishing Task Force Report at 3-4 (emphasis added). The report noted that, "[b]esides high-tech activities such as phishing and Internet-based fraud, there are other types of identity theft committed against Hawaii residents involving very low-tech activities. Some of the perpetrators are close friends and family members who . . . use without authorization the victim's confidential personal information to obtain credit."

Id. at 4 (emphasis added). Accordingly, the task force also "discussed ways in which the State could deter the low technology, non-electronic activities, which frequently precede electronic commerce-based identity theft crimes in Hawaii." Id. at 4-5.

The task force undertook a detailed review of state identity theft statutes. Id. at 10-12, Appendices I and II. The task force noted that "many states define the act of identity theft as when a person uses another's personal identifying information for any unlawful purpose," while in other states, "possession alone of another's personal identifying information without authorization and with intent to defraud or commit a crime or for any unlawful purpose constitutes an offense[.]" Id. at 10-11.

The task force made the following recommendation relevant to the instant case:

> Law enforcement agencies in Hawaii have found it difficult to curb the rise in identity theft related crimes because identity thieves in possession of personal information that have not yet caused a monetary loss to the victim cannot be prosecuted for crimes other than petty misdemeanors. The Task Force supports legislation that will provide law enforcement with more efficient enforcement and stricter enforcement penalties for identity theft crimes.
> - Specific Action: Amend [HRS §] 708-839.8, Identity Theft in the Third Degree to include a crime for possession or transfer of "confidential personal information" and [HRS §] 706-606.5 to include Identity Theft as a repeatable offense. . . .

Id. at 22.

Proposed legislation arising out of the Anti-Phishing Task Force Report was first considered by the Senate Committees on Commerce, Consumer Protection, and Housing and Media, Arts, Science, and Technology. S. Stand Comm. Rep. No. 2508, in 2006 Senate Journal, at 1248-49. The Committees noted that "[t]he purpose of this measure is to increase the penalties for identity theft and make it a crime to intentionally or knowingly possess the confidential information of another without that person's authorization." Id. at 1248 (emphasis added). The Committees further noted:

> Hawaii law enforcement has found it difficult to curb the rise in identity theft related crimes when identity thieves in possession of personal information who have not yet caused a monetary loss to the victim cannot be prosecuted for crimes other than petty misdemeanor thefts. A nominal criminal consequence is inadequate to address and deter possession of another's personal information, and in fact perpetuates the larger problem of identity theft. Your Committees find that increasing the penalties for identity theft by amending the law to make identity theft an enumerated offense within the repeat offender statute, and amending the law to make intentionally or knowingly possessing confidential information of another without authorization a class C felony, will help to deter identity theft crimes.[11]

Id. at 1249.

However, the Committees diverged from the task force's recommendation that the offense of UPCPI be incorporated into the offense of Identity Theft in the Third Degree. Instead, the Committees amended the proposal to add a new section to prohibit UPCPI, stating:

---

[11] These comments were largely incorporated into the Commentary to HRS § 708-839.55. See HRS § 708-839.55 cmt. (Supp. 2006).

> Your Committees further recognize that the unauthorized possession of confidential personal information should be treated as a separate offense from identity theft in the first degree, second degree, or third degree. The purpose of enacting a new law for the unauthorized possession of confidential personal information is to fill the loophole under current law and provide for appropriate criminal prosecution.

Id. at 1249 (emphasis added).

This history indicates that the statute was intended to deter a broader range of conduct than identity theft-related crimes. First, the legislative history indicates that, although the ultimate goal behind the UPCPI statute was to deter identity theft, the more immediate purpose was to "fill a loophole" and increase criminal penalties for conduct that would otherwise constitute a misdemeanor. Id. at 1248-49. Thus, the UPCPI statute was not enacted solely to prevent identity theft. Moreover, the legislature rejected the Anti-Phishing Task Force's recommendation to include the offense of UPCPI in the statute prohibiting Identity Theft in the Third Degree. Id. at 1249. It therefore appears that the legislature understood UPCPI to be distinct from identity theft, because it does not involve "a monetary loss to the victim[.]" Id.

Second, neither the plain language of the statute nor its legislative history establishes that the legislature intended to allow prosecution only where the defendant intended to commit identity theft. Indeed, the Anti-Phishing Task Force Report noted that the UPCPI statutes adopted in other jurisdictions often require that the defendant intended to use the information

to defraud another or commit a crime, or acted with another unlawful purpose. Anti-Phishing Task Force Report at 10-12, Appendices I & II. However, neither the task force nor the legislature recommended a provision that would predicate the offense of UPCPI upon an intent to commit identity theft.

Rather, HRS § 708-839.55 does not require that the defendant have any specific purpose in possessing the confidential personal information,[12] provided that the defendant possesses the information "without authorization[.]" (Emphasis added). Accordingly, Pacquing's argument that he did not commit UPCPI because he only intended to "mislead the police officer" and avoid arrest is unavailing, since there is nothing in the record to suggest Complainant authorized Pacquing to possess the information for that purpose.

Third, the legislative history evidences the legislature's intent to penalize Pacquing's conduct with a felony conviction. S. Stand Comm. Rep. No. 2508, in 2006 Senate Journal, at 1249. The legislature specifically noted, "A nominal criminal consequence is inadequate to address and deter possession of another's personal information, and in fact perpetuates the larger problem of identity theft." Id.

[12] Accordingly, we respectfully disagree with the dissent's assertion that the state of mind specified in HRS § 708-839.55, i.e., the intentional or knowing possession of confidential information, indicates that the purpose of the statute is limited to identity theft. Dissenting opinion at 30-31. Respectfully, nothing in the statute requires the prosecution to prove that the defendant possessed confidential personal information for this, or any other, specific purpose. HRS § 708-839.55.

Accordingly, although Pacquing argues that a potential felony conviction and indeterminate five year term of incarceration are too harsh in light of the potential for charging him with the misdemeanor offense of Unsworn Falsification to Authorities, this argument is unpersuasive.[13]

Finally, it is instructive to contrast the circumstances of this case with those in Viernes, where this court concluded that the circuit court did not abuse its discretion in dismissing as de minimis a prosecution for promoting a dangerous drug in the third degree. 92 Hawaiʻi at 135, 988 P.2d at 200. This court observed that the purpose of the statute at issue was to "respond to abuse and social harm" and "to counter increased property and violent crimes." Id. at 134, 988 P.2d at 199 (citation omitted). However, because the amount of methamphetamine possessed by the defendant was too small to be sold or used, his possession could not "lead to abuse, social harm, or property and violent crimes." Id. Accordingly, we affirmed the circuit court's dismissal order on

---

[13] In addition, Unsworn Falsification to Authorities is intended to prevent harms relating to the "[e]fficiency and fairness of governmental operations and public confidence in public administration[.]" HRS § 710-1063 cmt. (1993). "[T]he falsification must be made with intent to mislead a public servant in the performance of the public servant's official duty." Id. Although the commentary notes that this conduct may also have "unfortunate consequences . . . for the individual whose life, freedom or property may be affected," the clear objective of the statute is to ensure that "information which the government relies upon not be falsified." Id.

The statute is not directed at harms to individuals such as Complainant. Thus, although it appears that the State additionally could have charged Pacquing with Unsworn Falsification to Authorities, the availability of this charge does not render Pacquing's conduct a de minimis violation of the UPCPI statute.

the ground that it was not possible for the defendant's possession to lead to the harm the statute sought to prevent. Id. at 134-35, 988 P.2d at 199-200.

In contrast, there is nothing in the facts of the instant case to suggest that Pacquing's possession of Complainant's confidential personal information could not lead to identity theft or other crimes. As stated, Pacquing had been in possession of Complainant's confidential personal information since an unspecified time when the two were neighbors. He used Complainant's confidential personal information to attempt to avoid arrest on two known occasions. Had he not been arrested on April 7, 2008, Pacquing would have had a continuing opportunity to utilize Complainant's confidential personal information for a variety of criminal purposes. Accordingly, Pacquing's possession of Complainant's confidential personal information "implicates the precise harm the legislature sought to avoid" in enacting the UPCPI statute.[14] See Rapozo, 123 Hawaiʻi at 342, 235 P.3d at 338 (noting that the defendant's possession of "an operable bullet with the potential to kill or seriously injure a human being, to cause other physical harm, or to be used in the commission of a crime" implicated the harm the legislature sought to prevent in prohibiting felons from possessing firearms and ammunition).

[14] The State argued that Pacquing's conduct caused the harm or evil sought to be prevented by HRS § 708-839.55. Viernes is directly applicable on this point. Accordingly, we respectfully disagree with the dissent's assertion that this argument was waived by the State. Dissenting opinion at 32.

For the foregoing reasons, Pacquing's conduct caused or threatened the harm or evil sought to be prevented by the UPCPI statute.[15]

2. Pacquing did not establish that his conduct was too trivial to warrant the condemnation of conviction

HRS § 702-236(1)(b) permits a court to dismiss a charge as de minimis where the defendant's conduct "[d]id 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[.]" (Emphasis added). Before the court can make this determination, "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." Park, 55 Haw. at 616, 525 P.2d at 591. It is an abuse of discretion for a circuit court to dismiss a charge as de minimis without considering "all of the relevant surrounding circumstances" as required under HRS § 702-236. Rapozo, 123 Hawaiʻi at 347, 235 P.3d at 343. The defendant bears the burden of proof on this issue, and thus bears the burden of providing evidence to support a finding that his or her conduct implicated the harm or evil sought to be prevented by

[15] In the circuit court, Pacquing also argued that his conduct constituted a de minimis offense under HRS § 702-236(1)(c), which applies to conduct that "[p]resents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense." His application does not contain any arguments that specifically address this prong of the statute, and the only arguments which could reasonably be construed to apply are those we reject above. Accordingly, we do not separately address this prong of the statute.

the statute only to an extent too trivial to warrant the condemnation of conviction. Oughterson, 99 Hawaiʻi at 256, 54 P.3d at 427; Carmichael, 99 Hawaiʻi 75, 80, 53 P.3d 214, 219 (2002).

As set forth below, we conclude that the circuit court abused its discretion in concluding that the effect of Pacquing's conduct was too trivial to warrant the condemnation of conviction.[16] First, the circuit court disregarded principles of law set forth in the de minimis statute when evaluating the effect of Pacquing's conduct. See Rapozo, 123 Hawaiʻi at 336, 235 P.3d at 332 ("A court abuses its discretion if it clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.") (emphasis added) (citation omitted). Second, Pacquing failed to carry his burden of demonstrating that his possession of Complainant's confidential personal information was trivial, because he failed to address "the nature of the conduct alleged and the nature of the attendant circumstances[.]" HRS § 702-236(1).

[16] The circuit court did not make an express conclusion with regard to triviality. Rather, the circuit court concluded that "[Pacquing's] conduct caused harm only to a minimal extent, and certainly not serious enough to warrant a felony conviction." (Emphasis added). Although "minimal" and "trivial" do not have precisely the same meaning, compare Merriam-Webster's Collegiate Dictionary 791 (11th ed. 2003) (defining "minimal" as "the least possible," "barely adequate" or "very small or slight") with Black's Law Dictionary 1647 (9th ed. 2009) (defining "trivial" as "[t]rifling; inconsiderable; of small worth or importance"), we presume that the circuit court intended this conclusion to apply to the triviality requirement set forth in the de minimis statute.

In granting Pacquing's motion to dismiss, the circuit court stated:

> The circumstances surrounding the offense charged, the resulting harm or evil in this case, and the probable impact upon the community, are minimal. The police immediately believed the Complainant . . . when he informed them that he did not own a black Acura and he did not get pulled over on March 23, 2008. [Complainant] did not have to appear in traffic court and did not incur any traffic violations as a result of [Pacquing's] conduct. This minimal result does not warrant a felony charge for [Pacquing], or worse, a felony conviction.

In so concluding, the circuit court addressed the harm "actually cause[d]" by the offense. See HRS § 702-236(1)(b). However, the circuit court did not address the harm "threaten[ed]" by the offense, as required under HRS § 702-236(1)(b). The harm threatened by Pacquing's conduct is particularly relevant here, where the harm to Complainant was avoided only through a fortuitous turn of events: Officer Lum neglected to give Pacquing a copy of the infraction citation following the first traffic stop and thereafter traveled to Complainant's home to deliver the citation, Complainant then advised the police that he was not involved in the traffic stop, and Pacquing then was arrested for UPCPI before any further citations could be issued.

Had any of these events not occurred, Complainant would have incurred traffic citations for conduct in which he did not engage. Being unaware of the citations, Complainant would not have presented for any court appearances in relation to the citations. A bench warrant then could have been issued for

Complainant's failure to appear. In addition, Pacquing would have evaded arrest on the bench warrants he was attempting to avoid, and could have continued to receive additional citations in Complainant's name.[17]

The circuit court did not address any of these circumstances, or any other circumstances threatened by Pacquing's conduct, as required under HRS § 702-236(1)(b). Because the circuit court disregarded principles of law set forth in HRS § 702-236(1), it abused its discretion in granting Pacquing's motion to dismiss.

In addition, both Pacquing and the circuit court failed to adequately address the circumstances surrounding the offense. Rapozo is directly analogous on this point. There, the defendant was charged with Ownership or Possession Prohibited of Any Firearm or Ammunition By a Person Convicted of Certain Crimes, in relation to an incident in which she was arrested and a bullet was found in her bra during a search at the police station. Rapozo, 123 Hawaiʻi at 331, 235 P.3d at 327. The circuit court dismissed the charge as a de minimis violation. Id. On appeal, this court concluded that the circuit court's dismissal constituted an abuse of discretion because the defendant failed to adequately address her alleged conduct and attendant

[17] In its opposition to Pacquing's motion, the State argued, "Had [Pacquing] not been caught, Complainant would have suffered the repercussions of two unjustified traffic citations." Accordingly, we respectfully disagree with the dissent's assertion that these circumstances were never argued by the parties. Dissenting opinion at 38.

circumstances. Id. Although her counsel's declaration stated that she was in possession of the bullet because she intended to have it made into a charm for a bracelet, she

> offered no further evidence or testimony to corroborate that asserted explanation. She did not explain why, if her purpose in possessing the bullet was to make it into a charm for a bracelet, she was carrying it with her while driving at 1:14 a.m. in Waikiki. Nor did she explain why, if her purpose was benign, she concealed the bullet in an intimate part of her clothing. Nor did she explain where and when she obtained the bullet, and where she was traveling from and going to when she was stopped by police.

Id. at 345, 235 P.3d at 341.

Here, Pacquing has offered even less with regard to his alleged conduct and the attendant circumstances. None of the facts set forth in Pacquing's declaration of counsel or his de minimis motion explain the circumstances surrounding Pacquing's unauthorized possession of Complainant's confidential personal information. Moreover, the only fact in the circuit court's findings that addresses the circumstances surrounding Pacquing's unauthorized possession of Complainant's confidential personal information was apparently taken from the State's memorandum is opposition, and states, "[Complainant] is [Pacquing's] neighbor."[18] The remaining facts in both Pacquing's declaration

[18] The circuit court's finding that Pacquing and Complainant were neighbors is unchallenged and therefore binding on this court. See Kelly v. 1250 Oceanside Partners, 111 Hawaiʻi 205, 227, 140 P.3d 985, 1007 (2006). Nevertheless, we disagree with the dissent's assertion that this finding is based on evidence submitted by Pacquing. Dissenting opinion at 41. In asserting that Pacquing put these facts before the court, the dissent relies on argument contained in Pacquing's Motion to Dismiss, or in the Alternative, Motion for a Bill of Particulars, rather than on the declaration of counsel and argument submitted in relation to Pacquing's de minimis motion. See Dissenting opinion at 40-41, 41 n.22.

of counsel and the circuit court's findings of fact address the circumstances surrounding Pacquing's two traffic stops, and do not provide any information with regard to Pacquing's possession of Complainant's confidential information. The fact that Complainant is Pacquing's neighbor does not, by itself, explain how Pacquing came to possess that information.[19]

Moreover, unlike in Rapozo, Pacquing did not offer a "benign" explanation for his conduct. Id.; see also Park, 55 Haw. at 617-18, 525 P.2d at 592 (concluding that it was an abuse of discretion to dismiss a charge as de minimis "without any indicators to show that [the offense] was in fact an innocent, technical infraction"). Indeed, Pacquing offered no explanation at all. Additionally, although he now asserts that he possessed the Complainant's information in order to avoid arrest, this explanation cannot be described as benign, innocent, or a technical infraction.[20]

Pacquing argues that Rapozo is distinguishable from the instant case because, in Rapozo, the defense did not present any

---

[19] The dissent concludes that this information would be "naturally acquired over the course of their relationship" and "arose out of the ordinary circumstance of knowing to whom he lived next to." Dissenting opinion at 34, 41. Again, the dissent bases this conclusion on argument contained in Pacquing's Motion to Dismiss, or in the Alternative, Motion for a Bill of Particulars, rather than on the declaration of counsel and argument submitted in relation to Pacquing's de minimis motion. Dissenting opinion at 33-34. Moreover, this explanation does not appear in the circuit court's findings. Respectfully, the dissent's conclusion is speculative.

[20] Accordingly, we respectfully disagree with the dissent's assertion that the record indicates that Pacquing could have possessed Complainant's confidential information for an "unobjectionable purpose." Dissenting opinion at 33. The only "purpose" evident in the record was Pacquing's intent to avoid arrest on outstanding warrants.

evidence. However, Rapozo is identical to the instant case in this regard. "Rapozo addressed her alleged conduct and the attendant circumstances solely through her attorney's declaration in support of her motion to dismiss." Rapozo, 123 Hawaiʻi at 345, 235 P.3d at 341. Similarly, here, Pacquing addressed his alleged conduct and the attendant circumstances solely through his attorney's declaration in support of his motion to dismiss.

Nevertheless, Pacquing asserts that his case differs from Rapozo because, here, "both parties agreed to and stipulated that the facts set forth in the De Minimis Motion and in the State's Memorandum were all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense." However, the stipulation did not take place prior to or during the hearing on Pacquing's motion, but rather after the circuit court ruled and the State filed its notice of appeal. Thus, the circuit court did not have jurisdiction to accept the stipulation, and the stipulation was of no effect. TSA Int'l Ltd. v. Shimizu Corp., 92 Hawaiʻi 243, 265, 990 P.2d 713, 735 (1999) ("Generally, the filing of a notice of appeal divests the trial court of jurisdiction over the appealed case.") (citation omitted). In any event, there was no stipulation as to the facts at the time the circuit court ruled on the de minimis motion.[21]

[21] During the hearing on the stipulation, the DPA stated, "Well, my understanding is that back then, I am pretty sure that both sides already (continued...)

Finally, even assuming that the State somehow could be limited by its post hoc stipulation, the State did not, as Pacquing asserts, agree that the stipulated facts were "all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense." Rather, the State stipulated that "there are no material differences in the recollection of the facts" set forth in the respective memoranda, and that "those facts should be made part of the record[.]"[22] Moreover, regardless of the State's stipulation, it was nonetheless Pacquing's burden to establish that his conduct did not cause or threaten the harm sought to be prevented by the UPCPI statute, or that it did so only to a trivial extent. See State v. Fukugawa, 100 Hawaiʻi 498, 507, 60 P.3d 899, 908 (2002). For the reasons set forth above, he did not meet this burden.

Accordingly, the circuit court abused its discretion in granting Pacquing's motion to dismiss.

---

[21](...continued)
stipulated to the facts that were in the respective memorandum[.]" However, there is nothing in the record to indicate that the parties had previously stipulated to these facts. Rather, the only stipulation contained in the record is that which occurred subsequent to the filing of the State's notice of appeal.

[22] Accordingly, the dissent's citation to State v. Adler, 108 Hawaiʻi 169, 175, 118 P.3d 652, 658 (2005), in which a party was judicially estopped from taking contrary positions with respect to the applicable law during the course of a case, is inapposite. See dissenting opinion at 14 n.6.

IV. Conclusion

Although we do not adopt the ICA's reasoning, we agree with its conclusion that the dismissal order must be vacated. Accordingly, we affirm the ICA's February 23, 2012 judgment, which vacated the circuit court's February 11, 2009 Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Dismiss for De Minimis Violation, and remanded for further proceedings.

Craig W. Jerome for petitioner

Brian R. Vincent for respondent

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ R. Mark Browning