NO. CAAP-16-0000460
IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CYRINA HEWITT, Defendant-Appellant.	Case No. 3DTA-15-00745 APPEAL FROM JUDGMENT AND NOTICE OF ENTRY OF JUDGMENT entered on May 7, 2014 DISTRICT COURT OF THE THIRD CIRCUIT, KONA DIVISION HONORABLE MARGARET K. MASUNAGA Judge

OPENING BRIEF OF DEFENDANT-APPELLANT

and

APPENDICES "A"-"B"

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I. STATEMENT OF THE CASE

On March 12, 2015, the State charged Cyrina Luella Hewitt by Complaint with Operating a Vehicle Under the Influence of an Intoxicant ("OVUII") in violation of Hawaii Revised Statutes ("HRS") § 291E-61(a)(1) and/or (a)(2) and/or (a)(4), with a prior conviction for OVUII within five years of the instant offense, Count I; and Driving Without a License in violation of HRS § 286-102(b), Count II. Record on Appeal ("RA"): JIMS: Complaint and Penal Summons (03/12/2015): 1-2.[1] Both offenses were alleged to have occurred on or about July 2, 2014. JIMS: Complaint and Penal Summons (03/12/2015): 1-2.

A. Motion to Suppress

On July 14, 2015, Hewitt filed Motion to Suppress, seeking to preclude from trial, *inter alia*, Hewitt's statements and fruit of the illegally obtained statements. JIMS: Motion to Suppress (7/14/2015): 2. On August 11, 2015, the district court held a hearing on the Motion to Suppress at which the following evidence, relevant to this appeal, was adduced:

[1] The Record on Appeal ("RA") in this case is available in electronic format and accessible through the Judiciary Information Management System ("JIMS") or the Judiciary Electronic Filing and Service System ("JEFS"). Citations to the RA on JIMS reference the title of the document, the date notated on JIMS and the relevant page numbers. Citations to the RA on JEFS reference the pdf document filing number and the relevant page citation.

On July 2, 2014, Hawaii County Police Department ("HCPD") Officer Chandler Nacino was on duty and made contact with Hewitt at the hospital. JEFS: 6: 9-10. Central dispatch received a call from the emergency room ("the ER") indicating that Hewitt was "an assault victim." JEFS: 6: 11. When he arrived at the hospital, the ER staff informed the officer that a male party had dropped off Hewitt. JEFS: 6: 28. Upon contact with Hewitt, Nacino noted that she had "large contusions on her face. Her eyes were swelled shut. She had a laceration on her ear." JEFS: 6: 11. After speaking with Hewitt, Officer Nacino stated that Hewitt "appeared to be out of it" and her "speech [was] slurred," she was disoriented and she did not know where she was. JEFS: 6: 11-12, 20-21.

Officer Nacino questioned Hewitt about the alleged assault. JEFS: 6: 12. He asked her why her eyes were swollen and Hewitt responded, that she "had a pink eye" and she "had a stye eye." JEFS: 6: 12. Hewitt's explanation was incoherent because her injuries did not appear to be consistent with either of those conditions. JEFS: 6: 12, 21-22.

At that point, the Hawaii Fire Department ("HFD") medics walked by and asked Officer Nacino "what was going on." JEFS: 6: 12. The officer informed the medics that he received a report of an assault. JEFS: 6: 12-13. The medics informed the officer "that they had found a truck on the shoulder of the roadway[ ]" "near the intersection of . . . Queen K. and Kuakini." JEFS: 6: 13. Upon learning of the medics' discovery, Officer Nacino sent his sergeant to investigate the truck. JEFS: 6: 13.

The truck involved in the accident was located on the "mauka shoulder of the roadway in the bushes." JEFS: 6: 14. Hewitt's State ID was discovered in a wallet in the truck and the "airbags had been deployed." JEFS: 6: 14. Officer Nacino learned that the registered owner of the truck was Cyrus Hewitt, who he assumed was Hewitt's father. JEFS: 6: 15.

After the officer learned all of the foregoing information, he returned to the ER and questioned Hewitt as to whether her father owned the truck and whether she was driving it. JEFS: 6: 15. At no time did Officer Nacino advise Hewitt of her right to remain silent or whether she desired an attorney. JEFS: 6: 23. Hewitt responded that she was "she was going to her friend's house on Lako and then parked the truck in the bushes." JEFS: 6: 16, 18. She also indicated that she was going to the doctor. JEFS: 6: 18. Officer Nacino did not give Hewitt any "indication that she was not free to leave at that time or [to] terminate her conversation with [him.]" JEFS: 6: 16. After Hewitt informed Officer Nacino that she was driving, Officer Nacino

arrested Hewitt for "operating a vehicle under the influence." JEFS: 6: 18. The officer then informed Hewitt that "they'd be conducting a blood draw." JEFS: 6: 19. Officer Nacino's decision to "implement a mandatory blood draw" was based on Hewitt's slurred speech, her disorientation, her involvement in a traffic accident that involved injuries and her statement that she had been driving. JEFS: 6: 19-20.

The district court denied the Motion to Suppress as follows[2]:

> Court has considered the written motion and the memorandum in opposition to Defendant's Motion to Suppress. Court has considered the testimony of Officer Chandler Nacino. Court finds the testimony of Officer Nacino to be very credible. And based on the record and files in this case, as well as the testimony of the officer, Court is going to deny Defendant's Motion to Suppress.

JEFS: 6: 41. The district court also stated,

> The Court finds that it was not a custodial interrogation. The testimony of the Officer Nacino indicates that he was investigating whether there was an assault initially.
>
> And the Court finds that Defendant was not under arrest. Um, there was no indication that Defendant was not free to leave while the officer was trying to investigate and figure out if Defendant was a victim.
>
> And based on further investigation and talking to the emergency room personnel, talking to the [HFD] personnel, Defendant was not under arrest, and only after the investigation and ascertaining by the officer that defendant stated to the officer that she was driving under that time – at that time then she was placed under arrest, not before.

JEFS: 6: 42. The district court set the matter for trial on October 28, 2015, and it ordered "documents" deadline on October 21, 2015. JEFS: 6: 43-44.

B. <u>Motion in Limine & Motion to Suppress Evidence</u>

On August 14, 2015 Hewitt filed Motion in Limine ("MIL") seeking to preclude from use at trial, *inter alia*, Hewitt's statements and the blood draw results. JIMS: Defendant's Motion in Limine (8/14/2015): 1-2. On October 22, 2015, Hewitt filed Motion to Suppress Evidence seeking to preclude the results of the Hewitt's blood draw that was obtained without a warrant,

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[2] On August 12, 2015, the district court filed Order and Notice of Entry of Order, however, the order did not contain any findings of fact or conclusions of law. <u>See</u> JIMS: Order and Notice of Entry of Order (8/12/2015): 1-2.

pursuant to Missouri v. McNeely, -- U.S. --, 133 S. Ct. 1552, 2013 LEXIS 3160 (2013). JIMS: Motion to Suppress Evidence (10/22/2015): 1.

The district court denied Hewitt's MIL and Motion to Suppress Evidence, without evidentiary hearings. The district court denied Hewitt's MIL as follows:

> Court is in receipt of the documents filed in the court, as well as the representations and arguments this morning and, previously, on August 11, 2015. And Court is going to allow the statements made by defendant, Cyrina Hewitt, based on a totality of the circumstances. Also, defendant was not under arrest. Court finds the testimony of – previous testimony of witness Officer Chandler Nacino to be a credible witness, and the officer was trying to figure out if defendant was a victim. Defendant was not under arrest. Defendant was not under any custodial interrogation. Officer Nacino was assessing the situation as to whether Cyrina Hewitt was a victim of an assault.
>
> And based on the totality of the circumstances, Court is gonna allow the statements.

JEFS: 20: 7-8. Similarly, the district court denied Hewitt's Motion to Suppress Evidence, in relevant part, as follows:

> Regarding the substance of the Motion to Suppress, the Court finds in favor of the State and is denying the Motion to Suppress. In addition for it not being timely, Court finds that the case law provided by the State is persuasive and the special facts of this case is more in line with the Schmerber[3], S-c-h-m-e-r-b-e-r, case, and also the legislative intent of the statute that allows the blood draw in the State of Hawaii is more in line with the arguments put forth by the State in its Opposition to the Motion to Suppress.
>
> Court is going to deny Defendant's Motion to Suppress regarding – in regards to the blood draw taken on or about July 3, 2014.

JEFS: 20: 14-15.[4]

Immediately following the district court's ruling on Hewitt's motions, the district court commenced a bench trial where the following evidence, relevant to the appeal, was adduced.

C. Trial

1. State's Case

Testimony of Mekia Rose

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[3] Schmerber v. California, 384 U.S. 757, 56 S. Ct. 1826 (1966).

[4] The district court also found that the Motion to Suppress had been untimely under Rule 12(b) of the Hawaii Rules of Penal Procedure but addressed the "substance" of the motion.

HCPD Sergeant Mekia Rose testified that on July 3, 2014, he was the on-duty field supervisor for the District of Kona. JEFS: 20: 18-19. On that date, during the evening, Sgt. Rose received a call from on-duty HCPD Officers Chandler Nacino and Kaea Sugata. JEFS: 20: 19, 22. The officers informed Sgt. Rose that "a person was at the hospital for injuries, which they didn't know if it was from an assault or from a traffic accident." JEFS: 20: 19. The officers also received information that there was a "possible crash on Kuakini Highway by Lako Street." JEFS: 20: 19. The officers told Sgt. Rose that they suspected the person was driving the car. JEFS: 20: 22.

Sgt. Rose went to the possible crash location to investigate. JEFS: 20: 19. Upon arrival at the scene, Sgt. Rose found an unoccupied pick-up truck on the embankment of the "Queen K Highway" in some grass, brush and trees. JEFS: 20: 19-20. There appeared to be front-end damage. JEFS: 20: 20. Sgt. Rose looked inside, observed a woman's purse and found a driver's license belonging to Cyrina Hewitt. JEFS: 20: 20-21. Sgt. Rose took a photograph of the driver's license on his phone and sent the picture to Officers Nacino and Sugata via text message. JEFS: 20: 20. Sgt. Rose did not find any other identifications in the vehicle. JEFS: 20: 23-24.

Testimony of Chandler Nacino

On July 3, 2014, at approximately 1 A.M., HCPD Officer Chandler Nacino was on duty, and he made contact with Hewitt at Kealakekua Hospital ER on an assault call. JEFS: 20: 25-27. The ER staff believed Hewitt had been assaulted. JEFS: 20: 26. Officer Nacino received information that Hewitt was left at the hospital by an unknown male. JEFS: 20: 53.

The nurse had just left Hewitt's room when Officer Nacino and accompanying HCPD Officer Kaea Sugata entered the room. JEFS: 20: 53. Upon initial his initial contact with Hewitt, Officer Nacino suspected that she was under the influence of alcohol. JEFS: 20: 36. He noticed that Hewitt had "large amounts of swelling to her face and . . . a laceration to her ear." JEFS: 20: 26. When he asked Hewitt how she became injured, Hewitt responded with "incoherent answers." JEFS: 20: 27. Hewitt "made a statement about being able to handle her own shit," and she also stated that the reason her eyes were swollen was because she had stye eye. JEFS: 20: 54. Officer Nacino also asked Hewitt if she had been assaulted, and based on her response, the officer "[t]ried to figure out who she'd been assaulted by." JEFS: 20: 27.

Previously, at around 11:00 P.M., Officer Nacino received a report "that somebody had heard a traffic collision." JEFS: 20: 28. After Officer Nacino spoke with Hewitt, a paramedic informed Officer Nacino that "he'd seen a car on the shoulder of the roadway as he was coming up to the hospital." JEFS: 20: 28.

Officer Nacino had Sgt. Rose "make checks for the vehicle." JEFS: 20: 28. Sgt. Rose confirmed the location of an accident at the corner of Queen K and Kuakini. JEFS: 20: 54. Sgt. Rose also informed Officer Nacino that "he had found an ID for Cyrina Hewitt in the vehicle[,]" and he sent a picture of the identification to Officer Nacino's phone. JEFS: 20: 28-29. Both the name and the photograph on the identification matched Hewitt. JEFS: 20: 29. Sgt. Rose also informed Officer Nacino that both air bags in the vehicle were deployed. JEFS: 20: 60.

After the officer received the information from Sgt. Rose about the accident, he asked Hewitt if she had been in a traffic accident. JEFS: 20: 30. Over the objection of the defense, Officer Nacino testified that Hewitt told him that "she was driving the vehicle and had parked it there."[5] JEFS: 20: 30. Hewitt also stated that she was going to visit a friend and going to the

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[5] The defense objected to Hewitt's response to Officer Nacino on the grounds of, *inter alia*, HRS § 621-26 that the statement needs to be shown to be "intelligent, voluntarily and knowingly made." JEFS: 20: 31. The district court permitted defense counsel to *voir dire* Officer Nacino about Hewitt's responses. JEFS: 20: 31.

Officer Nacino stated that he was at the hospital responding to a report that there was an assault. JEFS: 20: 32. Hewitt provided her name and she was also rambling incoherently. JEFS: 20: 32. For example, when discussing her appearance, Hewitt stated that she had stye eye. JEFS: 20: 32. The answer was inconsistent with her appearance where her face was swollen shut and her eyes were completely swollen shut. JEFS: 20: 32. Hewitt also had a laceration on her ear. JEFS: 20: 35. At the time of the questioning, Hewitt was in the hospital, clothed in a hospital gown and lying down. JEFS: 20: 32-33. Hewitt was not aware that Officer Sugata had taken her photograph. JEFS: 20: 33.

Officer Nacino, along with Officer Sugata, were attired in their uniform, with their side arms, and alone inside Hewitt's hospital room with Hewitt. JEFS: 20: 33-34. Officer Nacino also served Hewitt with a legal document, from an unrelated case, which required Hewitt's signature. JEFS: 20: 34. Officer Nancino stood directly next to Hewitt's bed. JEFS: 20: 34. During his initial contact with Hewitt, Officer Nacino suspected that she was under the influence of an intoxicant. JEFS: 20: 35-36.

After his initial contact with Hewitt, Officer Nacino contacted Sgt. Rose and made the investigative request. JEFS: 20: 34. Officer Nacino "believe[d] that [Hewitt] possibly could have had" injuries consistent with either an assault or car accident. JEFS: 20: 36. After Sgt. Rose sent the information, Officer Nacino resumed his questioning with Hewitt. JEFS: 20: 35. Prior to questioning Hewitt, Officer Nacino did not know if she received any medication. JEFS: 20: 36.

doctor. JEFS: 20: 55-56, 59. After Hewitt admitted to driving, "we stopped asking any questions." JEFS: 20: 39. Based on Hewitt's admission, his belief that she was involved in a traffic collision with injuries, Officer Nacino placed Hewitt under arrest for "suspicion of operating a vehicle under the influence," and he ordered a blood draw. JEFS: 20: 40-41.

Officer Nacino witnessed the blood draw, at around 3:30 A.M., by Tanya Strom. JEFS: 20: 46-47, 51. After the blood draw, Officer Nacino ran "checks" on Hewitt's driver's license using his laptop. JEFS: 20: 50. Over the hearsay objection of the defense, Officer Nacino testified that based on the checks, he received the response "[t]hat the defendant had a suspended license[.]" JEFS: 20: 51.

Testimony of Kaea Sugata

On July 3, 2014, at around 1 A.M., HCPD Officer Kaea Sugata was on duty and he, along with Officer Nacino, made contact with Hewitt at Kona Community Hospital. JEFS: 20: 62-63, 68. The two officers were dispatched to the hospital on a report of a female with "injures relative to an assault." JEFS: 20: 63. Upon arrival at the hospital, the staff told the officers that Hewitt was brought into the hospital by a male party who was no longer in the area. JEFS: 20: 65.

During the first of two contacts with Hewitt, Officer Sugata observed that she had "pretty significant injuries to the head" including "black eyes, closed eyes, scratches" and she was "dirty" with leaves on her person. JEFS: 20: 63-64. Officer Sugata took photographs of Hewitt. JEFS: 20: 64. Officer Sugata told Hewitt that the officers "were conducting an investigation relative to an assault." JEFS: 20: 66. Hewitt made random statements including her business partner who owed her $5,000, and that her eyes appeared in that condition because of stye eye. JEFS: 20: 71. In response to the questions about being assaulted, she also stated that she was driving to a friend's house, to a doctor's appointment and she gave the officer the location of her parked vehicle. JEFS: 20: 67, 83.

The officers were informed "by a passing [HFD] personnel member" that "the female party who was involved in a traffic collision." JEFS: 20: 66. Previously, around 11:00 P.M., Officer Sugata heard over the police radio that there was a "sound of a possible traffic collision." JEFS: 20: 78. After the report, Officer Sugata investigated a "general area," however, he did not find an accident. JEFS: 20: 81.

The district court apparently overruled the defense's objection. JEFS: 20: 38.

Based on Hewitt's statements, Officer Sugata's previous accident investigation, and the information provided by HFD, Officer Sugata "had reason to believe" that Hewitt was the driver of the vehicle involved in the same traffic collision. JEFS: 20: 66-67, 81.

After her statements, Officer Sugata contacted Sgt. Rose, though he was not sure if Officer Nacino separately spoke with Sgt. Rose. JEFS: 20: 67-68. Sgt. Rose confirmed the location of the traffic accident. JEFS: 20: 68. Officer Sugata believed that Sgt. Rose sent a text message to Officer Nacino regarding an identification card for Hewitt that was found in the vehicle involved in the collision. JEFS: 20: 79. After Officer Sugata received confirmation of the traffic accident, he informed Officer Nacino. JEFS: 20: 68. Sgt. Rose informed Officer Sugata of the license plate number of the vehicle involved in the collision, and Officer Sugata checked on the ownership of the vehicle. JEFS: 20: 82. The vehicle belonged to Hewitt's father, Cyrus Hewitt. JEFS: 20: 82. After Sgt. Rose found Hewitt's identification card, she was interviewed a second time by the officers. JEFS: 20: 79.

After the second interview with Hewitt, she was subjected to a mandatory blood draw though Officer Sugata did not observe it because he did not order the blood draw and left Hewitt after 3:00 A.M. JEFS: 20: 68-69, 79.

Testimony of Tanya Strom

Medical technologist Tanya Strom is employed by Clinical Labs of Hawaii ("CLH") and primarily worked at Kona Hospital. JEFS: 20: 85. On July 3, 2014, Strom conducted a legal blood draw at 4 A.M. JEFS: 20: 88, 96. She placed the blood draw, contained in two gray topped tubes, in a biohazard bag and sealed the bag with security tape with her initials and the date on it. JEFS: 20: 91. The blood is sent to Oahu for testing which is conducted at CLH's toxicology department. JEFS: 20: 88, 95.

Testimony of Robin Koide

Medical technologist Robin Koide[6] is employed by CLH, Toxicology Department. JEFS: 20: 99. Koide works at CLH located at the Airport Trade Center in Honolulu. JEFS: 20: 99. His general duties include "run [sic] whole blood DUI alcohols [sic] on DUI arrests." JEFS: 20: 101.

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[6] Koide graduated from University of Hawaii, Manoa with a Bachelor of Science degree in medical technology. JEFS: 20: 99. He is a certified medical technologist certified by the American Society for Clinical Pathology. JEFS: 20: 99. Koide was certified throughout the month of July 2014. JEFS: 20: 100.

Koide is licensed by the State of Hawaii, Department of Health, as a medical technologist who is qualified to run the blood tests. JEFS: 20: 101. He was trained in sample preparation by Dr. Clifford Wong. JEFS: 20: 101. Koide uses a gas chromatograph mass spectrometer ("GCMS") to conduct the blood tests. JEFS: 20: 104. In 2008 or 2009, Dr. Maldonaldo, a representative from Agilent Technology, the machinery manufacturer, trained Koide in the operation of the machine. JEFS: 20: 101, 104, 120-121. The training consisted of a lecture and "actual on-instrument training." JEFS: 20: 101.

Koide conducts blood screenings and tests every Tuesday and Thursday that he is at work. JEFS: 20: 102. There are mandatory guidelines that he must follow in conducting a blood test. JEFS: 20: 102.

The machine undergoes maintenance on "Tuesdays and Thursdays, which is called the daily maintenance." JEFS: 20: 105. Koide only conducts maintenance on the days in which he uses the machine but "a daily maintenance would be something that if you use the instrument every day, you would do that maintenance." JEFS: 20: 105. There is also monthly maintenance and annual maintenance. JEFS: 20: 105. During the annual maintenance, a service representative from the manufacturer "comes in and overhauls the entire instrument." JEFS: 20: 105.

The procedure to conduct a blood test is initiated by turning on the machine. JEFS: 20: 105. The machine warms up and Koide checks whether the displays "are blinking." JEFS: 20: 105. The displays will blink if the operating temperature is not in the operating range. JEFS: 20: 106. A computer, connected to the GCMS, "controls" it. JEFS: 20: 106, 121. The computer calculates the readings for the specimens that are tested. JEFS: 20: 121. If the instrument is not at the proper temperature, the display is "red and its says not ready. JEFS: 20: 106. The instrument will not conduct an analysis if the temperature is not in operating range. JEFS: 20: 106. After the instrument "comes up to temperature, maybe about one, one-and-a-half hours, everything is green and it tells you it's ready to go." JEFS: 20: 106. Koide then checks the displays to ensure the gas chromatograph has "full cylinders of gas, enough for that particular run." JEFS: 20: 106. The display also indicates "the flow rates of each gas." He checks that "they're full, it's flowing at the proper rate." JEFS: 20: 107.

Next, Koide calibrates the instrument. JEFS: 20: 107. He prepares a calibrators as follows:

> First of all, to prepare the samples and all the calibrators, it's prepared in the same way. It's – there's a special vial that I put the 250 microliters of – two, yea – or 0.250 ML's of sample in each of those vials, be it calibrators, controls, or respondent samples; add an internal standard to it, put salt in it to salt it out, and seal each vial. But I do it one at a time. I don't just again, pipe it all — you know, each calibrator's done one at a time.
>
> And after I seal it up, it's an airtight seal, and then I put it on the instrument and start its run. It will sample a blank first, which is just – the sample is distilled water.
>
> * * *
>
> The blank, of course, should report out "no alcohol." And then after the blank goes, then the calibration starts. . . . As it's sampling each calibrator, it prints out the reading. . . . And I can see each calibrator and what it's reading. And when all five calibrators are completed, I have a calibration curve, and it gives me a coefficient. The calibration should be a straight line.
>
> If it's – the points are all – the lines are skewed, then the coefficient would be lower. And I'm expected to get – a perfectly straight line is 1.0000. I'm supposed to get at least 0.99, I think. Anything less than that, I have to repeat the calibration.

JEFS: 20: 107-108. Koide follows these steps every time he conducts a blood test. JEFS: 20: 108. The computer software calculates the calibrations. JFES: 20: 121. If something was wrong with the software, the yearly maintenance would address it, however, if the software was malfunctioning, it would be obvious because the results would be erratic and the three samples would not be within 5 percent of each other. JEFS: 20: 122.

After a successful calibration, Koide runs three levels of controls, including a negative sample. A negative sample uses "blood from a volunteer who claims that he or she did not have anything to drink." JEFS: 20: 115. Koide uses 250 microliters, the internal standard, the salt and he runs the sample. JEFS: 20: 115. The negative sample also needs to show that "the instrument does not report out any alcohol in that sample." JEFS: 20: 115. The three levels of controls that he runs has to "come in within a plus or minus of a specific range; . . . .050, .100, and .200. They have to come out within a certain particular range. If they're out, that indicates either the instrument is malfunctioning or those controls have gone bad, and I have to repeat them." JEFS: 20: 115.

On July 8, 2014, Koide conducted a blood test at the Airport Trade Center, in the toxicology department, collected under the name of Cyrina Hewitt. JEFS: 20: 109. Koide

retrieved the blood sample from a walk-in refrigerator in the lab. JEFS: 20: 109. On that day, Koide went into the refrigerator, pulled out the rack "and their accompanying paperwork, which are in folders, and I match the name with each name on the chain-of-custody forms." JEFS: 20: 110. When he retrieved the blood sample, there was nothing unusual about its appearance. JEFS: 20: 110-111. The sample was "in a gray-capped tube with the labels of the name, date, and maybe the initials of whoever collected it." JEFS: 20: 111. The name matched the paperwork from the chain of custody form. JEFS: 20: 111. The security seals were intact because if they were tampered or broken, then Koide would not run the test. JEFS: 20: 111.

After retrieving the sample labeled Cyrina Hewitt from the refrigerator, Koide prepared it for the test. JEFS: 20: 113. He "pipe[d] it out. 250 microliters of sample and 250 microliters of internal standard and 1 gram of salt, sodium chloride. Sealed it up. And I did that in triplicate, because we run each sample in triplicate, and – along with all the other samples that I had to run at that particular time, day." JEFS: 20: 114. The rule that Koide employs is that during the triplicate test, "two out of the three samples have to be within 5 percent, and I take the lowest result. If that doesn't – it's not met, then that whole test is invalid and I have to toss that and repeat it on another day." JEFS: 20: 115-116. And after the respondent triplicate tests, Koide "put on a calibration check. I take one of the calibrators that I calibrated the instrument with and – so, for example if I take a .100 calibrator, that .100 calibrator has to be within plus or minus 5 percent. If it's not, then that invalidates the testing and I have to repeat it." JEFS: 20: 116. Koide "did this all" in accordance with his training and the guidelines. JEFS: 20: 114. He also testified that the instrument was working properly and all of the parameters were acceptable when he ran the Cyrina Hewitt sample on July 8, 2014. JEFS: 20: 114, 116. Koide tested the sample for ethanol, which is found in alcoholic beverages. JEFS: 20: 114.

Koide "looked at the three results that I got, because it's run in triplicate. I took the lowest one, and I see if it's within 5 percent of the next highest one, and I took that lower result." JEFS: 20: 116. Over the relevancy and foundation objection of the defense, the district court permitted Koide to testify that the results were 0.169 grams per hundred ML's of whole blood. JEFS: 20: 117. Koide indicated the results on the ADLRO form, State's Exhibit 12. JEFS: 20: 117. Over the relevancy and foundation objections of the defense, the district court admitted State's Exhibit 12. JEFS: 20: 118-119.

Testimony of Clifford Wong

Dr. Clifford Wong[7] is the Technical Director, Toxicology Department at CLH, and he was so employed during July 2014. JEFS: 20: 124-125. Dr. Wong's job is to "oversee the Toxicology Department, its clinical and forensic operations." JEFS: 20: 125. Dr. Wong's department works with "various County police and law enforcement agencies for the DUI program, both for alcohol and drugs." JEFS: 20: 125. CLH certified itself to perform DUI blood draws because it has a license from the Department of Health. JEFS: 20: 127.

Dr. Wong's duties include overseeing the general operation to "ensure that all the procedures that we follow are sound, forensically and technically." JEFS: 20: 128. Dr. Wong signs off on all of the forensic reports, reviews all the work that the staff performs on their analysis, verifies that all the proper control specimens and quality assurance measures were followed. JEFS: 20: 129. He also certifies that all the controls were run and were properly in range and the he "sign[s] off and send off the reports to the law enforcement agencies." JEFS: 20: 129. And he also conducts exams or screening on blood samples that have been tested by other technicians. JEFS: 20: 129.

The samples arrive at CLH by courier. JEFS: 20: 139. Hawaii County has the courier pick up the sample from the hospital where the samples are drawn. JEFS: 20: 140. CLH's couriers pick up the samples from the airport from Hawaiian Airlines or Aloha Airline Cargo. JEFS: 20: 140. The samples arrive with the bag seals intact. JEFS: 20: 140. The samples are received into the lab and placed in the locked refrigerator. JEFS: 20: 140. The samples are then pulled out and logged which at that point, either Koide or Dr. Wong will open the bag to look at the specimens to ensure that their integrity was not compromised. JEFS: 20: 140. Then, the chain of custody log is filled out by whoever examines the specimen. JEFS: 20: 140-141.

The blood samples are stored in a locked refrigerator. JEFS: 20: 138. The samples have "tamper evidence seals over them. When we receive them, we note and record down that they came to us in a sealed bag, with individual tamper evidence seals over the tubes." JEFS: 20: 139. The tubes also have a proper name on them. JEFS: 20: 139.

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[7] Dr. Wong has a bachelor's of science in chemistry and a Ph.D. in biochemistry. JEFS: 20: 125-126. He received his Ph.D. from Michigan State University. JEFS: 20: 126. He is board certified as a forensic toxicologist by the American Board of Forensic Toxicology. JEFS: 20: 126. He is also a member of two professional societies, The Society of Forensic Toxicologists and the American Academy of Forensic Sciences. JEFS: 20: 126.

Dr. Wong works with Koide. JEFS: 20: 129. Koide conducts blood tests on alcohol and drug draws. JEFS: 20: 129-130. Dr. Wong confirms Koide's test results. JEFS: 20: 130. Dr. Wong is certified to confirm blood test and is certified to operate the instruments. JEFS: 20: 130-131. He has a license from Agilent, and both he and Koide were trained on the software and the maintenance of the instruments. JEFS: 20: 131.

In this case, the gas chromatograph mass spectrometer ("GCMS") was used. JEFS: 20: 131. Dr. Wong is also trained by Agilent Technologies in maintenance of the GCMS. JEFS: 20: 131. There is weekly, monthly and annual maintenance performed on the GCMS. JEFS: 20: 131. There is "a whole list of duties" that are performed and "they all have to fall within a certain spec value." JEFS: 20: 131. If the values are not met, the instrument is "off-line" and corrected. JEFS: 20: 131-132. If they cannot fix the problem, then the local technical representative from the company will come in to service the instruments. JEFS: 20: 132.

The procedures for confirmation a blood test for alcohol is as follows:

> . . . We have a standard operating procedure that lays out the setup; what procedure we follow from the beginning, when we receive the specimens; how they're prepped; and the sequence of steps that we follow; and the way they're listed on the load list programs on the instruments. That's all spelled out. . . . And the acceptance of our – when we run our controls, they have to fall within a certain range as well to indicate that the instrument is working correctly. . . . And I – that's part of my certification duties, is to ensure that all our control specimens and our negative specimens are running correctly.

JEFS: 20: 132-133.

Dr. Wong confirms the results of all blood alcohol tests, including the blood test conducted by Koide in July 2014 under the name Cyrina Hewitt. JEFS: 20: 136. He confirmed this sample by

> looking at the retention time of what was discovered and the measurement of the amount that was in there. I looked at the controls to make sure that the reported values what were outputted from the instrument correlated with the known ranges of that standard that was run through. They have to fall within a certain range, and if they are, then the results would indicate to me that the instrument was running properly and it was measuring the alcohol accurately. And I look at their results, the three results that would come out for, say, a test, a given individual, and then I would report the lowest of the three.

JEFS: 20: 137. Dr. Wong claimed to have followed these steps with Cyrina Hewitt's sample. JEFS: 20: 137. Over the objection of the defense, Dr. Wong testified that the lowest value

reported for the sample under Cyrina Hewitt was 0.169. JEFS: 20: 138. Dr. Wong filled out the Administrative Driver's license Revocation form and sent it off to the designated law enforcement agency. JEFS: 20: 138.

Dr. Wong is familiar with the effects of alcohol. JEFS: 20: 143. Alcohol "makes one drowsy, sleepy." JEFS: 20: 144. Alcohol can cause a person's sense of balance to become unsteady, the perception of time is slowed, person becomes mentally confused and unable to multitask, and alcohol slows a person's response the environment. JEFS: 20: 143-144. Dr. Wong also stated that if a person suffered a concussion or brain trauma, that would mimic the effects of alcohol as related to decision-making, perception of time, and motor abilities. JEFS: 20: 148-149.

Testimony of Shannon McCandless

Shannon McCandless is employed by the County of Hawaii and is a supervising driver's license examiner. JEFS: 20: 151. McCandless "oversees the Driver's License Division." JEFS: 20: 151. As part of her job, McCandless maintains records for driver's licenses and State identification. JEFS: 20: 151. Hawaii law governs the maintenance of the records. JEFS: 20: 151.

McCandless conducted a driver's license inquiry for Cyrina Hewitt. JEFS: 20: 153-154. McCandless indicated that Hewitt did not possess a class 3 Hawaii driver's license . . . That she was not exempt from a license under the relevant portion of Section 286-105[.]" JEFS: 20: 154.

After McCandless's testimony, the defense renewed its motion to suppress Hewitt's statement and the results of the blood draw. JEFS: 20: 159. The defense also moved for a judgment of acquittal. JEFS: 20: 161. The district court denied all three of the defense's requests. JEFS: 20: 168.

2. Defense Case

Testimony of Cyrus Hewitt

On July 2, 2014, sixty-five year old Cyrus Hewitt and his daughter Hewitt dined at Rosa's Cantina for dinner with Cyrus's friend Bill Thomas. JEFS: 10: 7.[8] That evening, Hewitt had two to three drinks, probably margaritas. JEFS: 10: 10-11. Hewitt was not "feeling real good" so she went to the car to wait. JEFS: 10: 8. Cyrus met a woman at the restaurant, and after dinner, he decided to leave with her. JEFS: 10: 8. At about 10:15 PM, Cyrus gave his keys

[8] JEFS #10 is the Tr. from May 20, 2016.

to Thomas so that he could drive Hewitt home. JEFS: 10: 8. Cyrus saw Thomas drive off with Hewitt in the passenger seat. JEFS: 10: 8.

Around 12:30 or 1:00 AM, Cyrus, who was already home, received a call from Thomas who indicated that "he had kind of ran off the road and didn't think my car was all that bad of shape but had to take my daughter to [Kona Hospital]." JEFS: 10: 8-9, 12. Later, the police contacted Cyrus and told him that the car was "totaled." JEFS: 10: 9.

Cyrus was unable to see Hewitt at the hospital because he did not have any transportation. JEFS: 10: 9. Hewitt's friend picked her up at the hospital and brought her home. JEFS: 10: 9. After July 2, 2014, Cyrus tried but was unsuccessful in contacting Thomas. JEFS: 20: 9.

Testimony of Cyrina Hewitt

On July 2, 2014, Hewitt, along with her father and his friend, "Uncle Bill," went to dinner at "Rosa's." JEFS: 10: 14. Hewitt had three mixed drinks, but she did not finish the third drink because she felt ill. JEFS: 10: 14-15. Because she was not well, Hewitt waited inside the car for the others to finish. JEFS: 10: 15.

Later, Cyrus came to the car and told Hewitt that Thomas was going to take her home because he was going to "hang out with the lady for a little bit and talk[.]" JEFS: 10: 15. Thomas drove from the restaurant while Hewitt fell asleep in the passenger seat. JEFS: 10: 15.

Hewitt woke up in the hospital alone and unsure where she was or what had happened. JEFS: 10: 15-16. Later, the police arrived and "continuously" woke her up. JEFS: 10: 19. Hewitt kept falling asleep because she was "pretty heavily sedated." JEFS: 10: 19. Hewitt did not remember having a blood draw or what she said to the police. JEFS: 10: 19-20.

Later, she woke up and called her father who told her that Thomas "had said that we were in a car accident." JEFS: 10: 16. Hewitt called a friend who picked her up from the hospital and took her home. JEFS: 10: 16. Hewitt needed the assistance of a wheelchair when she left the hospital because she had a broken breast plate. JEFS: 10: 19. Her friend had to help Hewitt enter the car. JEFS: 10: 19.

Hewitt had previously been convicted of driving under the influence of an intoxicant in December 2010. JEFS: 10: 16-17. On July 2, 2014, Hewitt did not have a valid driver's license. JEFS: 10: 17. Hewitt denied having a friend that lives near Lako Street. JEFS: 10: 18.

3. Verdict & Sentencing

The district court found Hewitt guilty as charged as to both offenses as follows:

> ... So the court has reviewed the entire record and file in this case, as well as the exhibits received into evidence, and has considered the testimony of the witnesses and considered the arguments of the parties.
>
> The court find the testimony of the following witnesses to be very credible: Sergeant Mekia Rose, Officer Chandler Nacino, Officer Kaea Sugata, Tanya Strom from Clinical Labs, Robin Koide, medical technologist, Clinical Labs, Dr. Clifford Wong, technical director, Clinical Labs, Shannon McCandless, County of Hawaii, supervisors for driver's license division.
>
> Court has also heard the testimony of Mr. Cyrus Hewitt and defendant, Cyrina Hewitt, and does not find their testimonies to be credible.
>
> The court has weighed the evidence presented, and abased on the totality of the circumstances, the court find the State of Hawaii has proved its case beyond a reasonable doubt and find defendant guilty of driving under the influence of alcohol and driving without a license.

JEFS: 10: 30-31.

The district court sentenced Hewitt for Count I, HRS § 291E-61(a)(1), OVUII, to, *inter alia*, $500 fine, 240 hours community service, court fees, and substance abuse assessment; and Count II, HRS § 286-102, DWOL, $100 fine and court fees. JEFS: 10: 33.

Hewitt timely filed the Notice of Appeal on June 14, 2016. JEFS: 1-4.

II. POINTS OF ERROR

A. The district court erred in denying Hewitt's Motion to Suppress.

The district court erred in denying Hewitt's Motion to Suppress her statements and the subsequent blood draw as fruit of the illegally obtained statements. State v. Medeiros, 4 Haw. App. 248, 645 P.2d 181 (1983). The district court denied the Motion to Suppress as follows:

> Court has considered the written motion and the memorandum in opposition to Defendant's Motion to Suppress. Court has considered the testimony of Officer Chandler Nacino. Court finds the testimony of Officer Nacino to be very credible. And based on the record and files in this case, as well as the testimony of the officer, Court is going to deny Defendant's Motion to Suppress.

* * *

> The Court finds that it was not a custodial interrogation. The testimony of the Officer Nacino indicates that he was investigating whether there was an assault initially.
>
> And the Court finds that Defendant was not under arrest. Um, there was no indication that Defendant was not free to leave while the officer was trying to investigate and figure out if Defendant was a victim.
>
> And based on further investigation and talking to the emergency room personnel, taking to the Hawaii Count Fire Department personnel, Defendant was not under arrest, and only after the investigation and ascertaining by the officer that defendant stated to the officer that she was driving under that time – at that time then she was placed under arrest, not before.

JEFS: 6: 41-42. Similarly, Hewitt's statements were inadmissible under HRS § 621-26 because the State failed to establish, based on the totality of the circumstances, that Hewitt's statements were voluntarily made pursuant to HRS § 621-26. State v. Kelekolio, 74 Haw. 479, 502, 849 P.2d 58, 69 (1993); see State v. Bowe, 77 Hawaii 51, 57-60, 881 P.2d 538, 544-547 (1994) (The State has the affirmative burden to establish voluntariness beyond showing that there was a proper Miranda warning and valid waiver or rights.); State v. Kreps, 4 Haw. App. 72, 77, 661 P.2d 711, 715 (1983) (same). The district court denied Hewitt's MIL as follows:

> Court is in receipt of the documents filed in the court, as well as the representations and arguments this morning and, previously, on August 11, 2015. And Court is going to allow the statements made by defendant, Cyrina Hewitt, based on a totality of the circumstances. Also, defendant was not under arrest. Court finds the testimony of – previous testimony of witness Officer Chandler Nacino to be a credible witness, and the officer was trying to figure out if defendant was a victim. Defendant was not under arrest. Defendant was not under any custodial interrogation. Officer Nacino was assessing the situation as to whether Cyrina Hewitt was a victim of an assault.
>
> And based on the totality of the circumstances, Court is gonna allow the statements.

JEFS: 20: 7-8.

Hewitt was subjected to custodial interrogation without first being advised of her Miranda rights. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966) (The Miranda rights includes warning the accused that she has the right to remain silent, that anything said could be used against her, that she has the right to the presence of an attorney, and that if she cannot afford an attorney, one will be appointed for her.). Article I, § 10 of the Hawaii

Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." State v. Pauu, 72 Haw. 505, 509, 824 P.2d 833, 835 (1992). It is established that "[w]hen a confession or other evidence is obtained in violation of [this right], the prosecution will not be permitted to use it to secure a defendant's criminal conviction." Id. (citing State v. Russo, 67 Haw. 126 , 681 P.2d 553 (1984)). Under the Miranda rule, the State must lay a sufficient foundation that the requisite warnings were administered or were validly waived "before it may adduce evidence of a defendant's custodial statements that stem from interrogation during . . . her criminal trial." State v. Ketchum, 97 Hawaii 107, 117, 34 P.3d 1006, 1016 (2001). Therefore, absent Miranda warnings, any statements made in the course of custodial interrogation without a valid waiver are inadmissible at trial. State v. Wallace, 105 Hawaii 131, 137, 94 P.3d 1275, 1281 (2004) (citation omitted).

Similarly, HRS § 621-26 states, "[n]o confession shall be received in evidence unless it is first made to appear to the judge before whom the case is being tried that the confession was in fact voluntarily made." It is well established that this statute covers all "the extra-judicial statements of the defendant who is on trial." State v. Wakinekona, 53 Hawaii 574, 576, 499 P.2d 678, 680 (1972).

Hawaii law acknowledges the difference between the voluntariness requirement stemming from the due process clause of the Fourteenth Amendment and Miranda's protection against self-incrimination. See State v. Cho, 135 Hawaii 406, 353 P.3d 1196 (App. May 27, 2015) (SDO).[9] HRS § 621-26 is unrelated to the constitutional protection against self-incrimination and clearly requires the trial court to take the extra procedural step of determining whether the factual circumstances surrounding the defendant's confession are suggestive of coercion. Here, the district court erred in finding that Hewitt's statements were voluntarily made without coercive circumstances.

Here, Hewitt was subjected to custodial interrogation in violation of the Miranda rule, the State failed to establish that the statements were made with a valid waiver and that the statements were made voluntarily. Thus, Hewitt's statements to the officers and the subsequent blood draw, based on her statements, were inadmissible and in violation of HRS § 621-26, article I, §§ 5 and 10 of the Hawaii Constitution and the fifth and fourteenth amendments to the United States

[9] Pursuant to Rule 35(c)(2) of the Hawaii Rules of Appellate Procedure, State v. Cho, CAAP-14-00000081, is attached hereto as Appendix "B."

Constitution. State v. Eli, 126 Hawaii 510, 273 P.3d 1196 (2012); Miranda, 384 U.S. 436, 86 S. Ct. 1602. As result of the district court's errors, the order denying the Motion to Suppress must be vacated and Hewitt's convictions must be reversed.

B. The district court erred in denying Hewitt's Motion to Suppress Evidence.

The district court erred in denying Hewitt's Motion to Suppress Evidence because the State failed to establish that exigent circumstances existed that justified the warrantless blood draw. State v. Entrekin, 98 Hawaii 221, 232, 47 P.3d 336, 347 (2002); State v. Won, 137 Hawaii 330, 345 n. 26, 372 P.3d 1065, 1080 n. 26 (2015); McNeely, 133, S. Ct. 1552.

The district court denied Hewitt's Motion to Suppress evidence as follows:

> Regarding the substance of the Motion to Suppress, the Court finds in favor of the State and is denying the Motion to Suppress. In addition for it not being timely, Court finds that the case law provided by the State is persuasive and the special facts of this case is more in line with the Schmerber, S-c-h-m-e-r-b-e-r, case, and also the legislative intent of the statute that allows the blood draw in the State of Hawaii is more in line with the arguments put forth by the State in its Opposition to the Motion to Suppress.
>
> Court is going to deny Defendant's Motion to Suppress regarding – in regards to the blood draw taken on or about July 3, 2014.

JEFS: 20: 14-15.

The district court's error violated Hewitt's right to be secure in ones person against unreasonable searches, seizures and invasions of privacy under the fourth amendment of the United States Constitution and under article I, § 7 of the Hawaii State Constitution. Based on the foregoing, the result of the blood draw must be suppressed and Hewitt's conviction in Count I, HRS § 291E-61(a)(1), OVUII, must be reversed.

C. The State failed to lay adequate foundation to admit the blood draw results.

The State failed to establish that the result of the blood content test was accurate and reliable because the State failed to comply with the foundational requirements of State v. Assaye, 121 Hawaii 204, 216 P.3d 1227 (2009), and State v. Manewa, 115 Hawaii 343, 167 P.3d 336 (2007). Over the foundation objection of the defense, the district court permitted both Koide and Dr. Wong to testify as to the purported result of the blood content test. JEFS: 20: 117, 138.

In particular, the State failed to establish that the GCMS instrument was tested according to the manufacturer's recommended procedures and found to be working properly and the nature and extent of Koide's training in the use of the GCMS was current and met the requirements indicated by the manufacturer. Assaye, 121 Hawaii at 213-214, 216, 216 P.3d at 1236-1237, 1239. The State also failed to adduce any evidence that the GCMS was installed, inspected and serviced as required by the manufacturer to establish accuracy of the instrument. Manewa, 115 Hawaii 343, 167 P.3d 336.

The district court's error violated Hewitt's right to due process protected under both article I, § 5 of the Hawaii Constitution and the fourteenth amendment of the United States Constitution. As a result, the incompetent evidence must be excluded and Hewitt's conviction under Count I, HRS § 291E-61(a)(1), OVUII, must be reversed because the State failed to prove each element of each offense beyond a reasonable doubt.

III. STANDARDS OF REVIEW

A. Sufficiency of the Evidence: The test of legal sufficiency of evidence is whether, "viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact." State v. Pesentheiner, 95 Hawaii 290, 293, 22 P.3d 86, 89 (App. 2001). The State must prove "every essential element of the crime charged" with substantial evidence. State v. Lima, 64 Haw. 470, 475, 643 P.2d 536, 539 (1982).

B. Motion to Suppress: "An appellate court reviews a ruling on a motion to suppress de novo to determine whether the ruling was right or wrong." State v. Prendergast, 103 Hawaii 451, 453, 83 P.3d 714, 716 (2004).

C. Findings of Fact and Conclusions of Law:

> Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. The circuit court's conclusions of law are reviewed under the right/wrong standard.

State v. Walker, 106 Hawaii 1, 9, 100 P.3d 595, 603 (2004) (internal quotation marks and citations omitted) (quoting State v. Naititi, 104 Hawaii 224, 233, 87 P.3d 893, 902 (2004)).

D. Evidentiary Foundation: "When a question arises regarding the necessary foundation for the introduction of evidence, the determination of whether proper foundation has

been established lies within the discretion of district court, and its determination will not be overturned absent a showing of clear abuse." Assaye, 121 Hawaii at 210, 216 P.3d at 1233.

E. Admissibility of Evidence: "When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard." Kealoha v. County of Hawaii, 74 Haw. 308, 319-20, 844 P.2d 670, 675-76 (1993). However, the abuse of discretion standard applies in the case of rules of evidence that require a "judgment call" on the part of the district court. Id.

F. Statutory Interpretation: "The interpretation of a statute . . . is a question of law reviewable *de novo*." State v. Arceo, 84 Hawaii 1, 10, 928 P.2d 843, 852 (1996) (Citation omitted.). The appellate court may also consider "the reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2). "Laws in *pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear is one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16; State v. Anger, 105 Hawaii 423, 430, 98 P.3d 630, 637 (2004) (internal citations and additional citations omitted).

G. Voluntary Statement: The trial court's findings of fact relating to whether the defendant's statement as voluntary as reviewed under the clearly erroneous standard of review. Dan v. State, 76 Hawaii 423, 428, 879 P.2d 528, 533 (1994). A trial court's conclusions of law are reviewed under the right/wrong test. Id. "Appellate review of whether a defendant's custodial statement to the police is the product of coercion requires us to 'examine the entire record and make an independent determination of the ultimate issue of voluntariness' based upon that review and 'the totality of circumstances surrounding the defendant's statement.'" Kelekolio, 74 Haw. at 502, 849 P.2d at 69.

IV. ARGUMENT

A. The district court erred in denying Hewitt's Motion to Suppress.

The right to remain silent, also known as the right against self-incrimination, is protected by both the United States and Hawaii State Constitutions. The fifth amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put

> in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Emphasis added.) Similarly, The Hawaii State Constitution, article I, § 10, states:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; *nor shall any person be compelled in any criminal case to be a witness against oneself.*

(Emphasis added.)

It is a "fundamental tenet" of criminal law that, "'prosecution may not use *statements*, whether exculpatory or inculpatory, *stemming from custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.'" Wallace, 105 Hawaii at 137, 94 P.3d at 1281 (citing Naititi, 104 Hawaii at 235, 87 P.3d at 904 (quoting Miranda, 384 U.S. 436, 444, 86 S. Ct. 1602) (emphases in original). The State must demonstrate that law enforcement officials gave certain warnings and followed specific procedures effective to secure the privilege against self-incrimination guaranteed by both article I, § 10 of the Hawaii State Constitution and the fifth amendment of the United States Constitution. The accused must be warned that she has a right to remain silent, that anything she says can be used against her, that she has a right to an attorney during questioning and that if she cannot afford an attorney one would be appointed for her. Id. The requirement that these rights be explained and knowingly, intelligently and voluntarily waived prior to questioning is commonly known as the "Miranda Rule" from Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602.

The "triggers" or criteria for the "Miranda Rule" are custody and interrogation. State v. Ah Loo, 94 Hawaii 207, 210, 10 P.3d 728, 731 (2000). An individual is in custody when she has been actually taken into custody by police or is "otherwise deprived of [her] freedom of action in any significant way." Ketchum, 97 Hawaii at 117, 34 P.3d at 1016.

> This determination is to be made by objectively appraising the totality of the circumstances. These include the place and time of the interrogation, the length of the interrogation, the nature of the questions asked, the conduct of the police,

> and all other relevant circumstances. Among the relevant circumstances to be considered are whether the investigation has focused on the suspect and whether the police have probable cause to arrest [her] prior to questioning.

Wallace, 105 Hawaii at 138, 94 P.3d at 1282; State v. Melemai, 64 Haw. 479, 481, 643 P.2d 541, 543 (1982). The ultimate question is whether the defendant is deprived of her freedom "in any significant way." Miranda, 384 U.S. at 444, 86 U.S. at 1602.

"Interrogation" means "express questioning or its functional equivalent." Ketchum, 97 Hawaii at 119, 34 P.3d at 1018 (citations omitted.) The ultimate question in determining whether "interrogation" has occurred is "'whether the police officer should have known that [her] words or actions were reasonably likely to elicit an incriminating response' from the person in custody." Id., (quoting State v. Ikaika, 67 Haw. 563, 567, 698 P.2d 281, 284 (1985)).

If the "Miranda warnings" are not given, any statements uttered by the defendant in response to the custodial interrogation must be suppressed and cannot be used at trial by the State for substantive or impeachment purposes. State v. Joseph, 109 Hawaii 482, 495, 128 P.3d 482, 808 (2006); Ah Loo, 94 Hawaii at 210, 10 P.3d at 731; HRS § 621-26 ("No confession shall be received in evidence unless it is first made to appear to the judge before whom the case is being tried that the confession was in fact voluntarily made.") Furthermore, the doctrine of the "fruit of the poisonous tree" is applicable to subsequent statements and physical evidence recovered in subsequent searches. Medeiros, 4 Haw. App. 248, 665 P.2d 181; State v. Moore, 66 Haw. 202, 659 P.2d 70 (1983); State v. Temple, 65 Haw. 261, 650 P.2d 1358 (1982).

1. Hewitt was in custody or otherwise deprived of her freedom in a significant way at the time of her statements.

In Miranda, the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [her] freedom of action in any significant way." Melemai, 64 Haw. at 480, 643 P.2d at 543. This determination is based on the totality of the circumstance, including the "place and time of the interrogation, the length of the interrogation, the nature of the questions asked, the conduct of the police and all other relevant circumstances." Id. at 480, 643 P.2d at 544 (additional citations omitted). Here, Hewitt was in custody at the time of her statements.

The officers interrogated Hewitt in her hospital room after 1:00 A.M. She was alone and the area was not open to the public. Hewitt lay on the hospital bed surrounded by two fully

uniformed and armed HCPD officers while she was sedated and clothed only in a hospital gown. Hewitt was also under medical treatment for a broken breast plate, and the nurse had just left her hospital room when the officers entered and commenced their interrogation.

Despite Hewitt's physical and mental condition, which included "pretty significant injures to [her] head" and "large amounts of swelling to her face," the officers "continuously" woke Hewitt to question her. She was not permitted to decline participation in the questioning. This is also despite the fact that both officers indicated that she was incoherent, rambling and disoriented. The officers interviewed Hewitt twice, though the timing of each interview is unknown. What is clear is that the officers initiated contact with Hewitt a little after 1:00 A.M. and the subsequent blood draw did not occur until 4:00 A.M. Hewitt was subjected to custodial interrogation for almost 3 hours.

Not only was Hewitt unable to leave due to the officers surrounding her hospital bed, but she was physically incapacitated. Hewitt stated that she was heavily sedated and had suffered a broken breast plate. She required the assistance of both a wheelchair and a person when she was discharged from the hospital. She had no other choice but to lie there and be compelled to answer the officers' questions. It is also significant that even if Hewitt was able to walk away on her own volition, she was not free to leave because Officer Nancino was serving her with a legal document from an unrelated case.

The questions were also indicative of custodial interrogation because prior to the questioning, Officer Nacino had probable cause to arrest Hewitt for the offenses. Both officers possessed the knowledge of the 11:00 P.M. collision report and Officer Sugata had previously investigated the area searching for the scene of the accident. From his initial contact with Hewitt, Officer Nacino believed that she was under the influence of alcohol. After speaking with a paramedic, Officer Nacino requested that Sgt. Rose check on the accident scene and received a picture of Hewitt's identification found in the vehicle involved in the accident. Officer Nacino then asked Hewitt about the ownership of the vehicle and if she had been driving.

Hewitt was deprived of her freedom and subjected to a coercive atmosphere that Miranda warnings were designed to prevent because she was unable to leave, she was surrounded by the police officers, she was intentionally deprived of her sleep and compelled to answer questions which were designed to elicit incriminating responses. Eli, 126 Hawaii at 521-22, 273 P.3d at

1207-1208. As a result, the district court erred in finding that Hewitt was not in custody or that her freedom of movement was significantly deprived.

2. The officers subjected Hewitt to custodial interrogation without advising her of her Miranda rights.

"Interrogation," as used in the Miranda context, is defined as "express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S. Ct. 1682 (1980). "The interrogation element depends on 'whether the police officer should have known that his or her words or actions were reasonably likely to elicit an incriminating response' from the person in custody." Ketchum, 97 Hawaii at 119, 34 P.3d at 1018 (quoting Ikaika, 67 Haw. 563, 698 P.2d 281). Here, the officers conducted an illegal custodial interrogation of Hewitt without advising her of her Miranda rights because they asked her express questions likely to elicit incriminating responses. Although the officers' testimony differs, it is notable that the district court relied upon and found Officer Nacino's testimony at the hearing on the Motion to Suppress and his testimony at trial "very credible."[10]

Based on the totality of the circumstances, including the officers' prior knowledge of the 11:00 P.M. collision report and Officer Sugata's previous collision investigation, Officer Nacino should have known that any question relating to Hewitt operating a vehicle involved in an accident would not only be reasonably likely to elicit an incriminating response, but it would be designed to incriminate Hewitt. Officer Nacino testified that with the prior knowledge of the accident, his belief that Hewitt was under the influence of alcohol, the information from the paramedic, the photograph from Sgt. Rose of Hewitt's identification found in the vehicle involved in the crash and his belief that Hewitt's injuries could be consistent with a car accident, he checked her driver's license status, and then he asked Hewitt whether she was driving it. Officer Nacino knew that if Hewitt was operating the vehicle, she would be doing so under the influence of alcohol and without a driver's license. Ketchum, 97 Hawaii at 119, 34 P.3d at 1018. As Officer Nacino failed to advise Hewitt her Miranda rights prior to interrogating her, all of her statements must be suppressed as the result of un-Mirandized, illegal custodial interrogation.

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[10] The district court also found Officer Chandler's trial testimony "very credible," however, he did not testify at the hearing on the Motion to Suppress.

3. All statements and evidence obtained subsequent to the officers illegal custodial interrogation must be suppressed as the "fruit of the poisonous tree" of that illegality.

As Hewitt's statements to the officers were obtained in violation of her right to remain silent, her subsequent statements must also be suppressed pursuant to the fruit of the poisonous tree doctrine.

> In State v. Fukusaku, 85 Hawaii 462, 475, 946 P.2d 32, 45 (1997), this court explained that, "[a]s for the suppression of derivative evidence, the 'fruit of the poisonous tree' doctrine 'prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act of the police.'" (quoting State v. Medeiros, 4 Haw. App. 248, 251 n. 4, 665 P.2d 181, 184 n. 4 (1983) (citing Silverthorne Lumber Co v. United States, 251 U.S. 385, 40 S. Ct. 182 (1920)).

Joseph, 109 Hawaii at 498, 128 P.3d at 811.

In the instant case, there was clearly a connection between the illegally-obtained statements to the officers and the blood draw. But for Hewitt's admission that she was driving the vehicle, there would not be a basis for Officer Nacino to order the mandatory blood draw. Officer Nacino testified as much. Therefore, the results of the blood draw directly resulted from the exploitation and taint of the illegally-obtained statements. Accordingly, the result of the blood draw should also have been suppressed as the "fruit of the poisonous tree" of the prior illegally obtained statement.

4. Hewitt's statements were prohibited under HRS § 621-26.

Under HRS § 621-26, "[n]o confession shall be received in evidence unless it is first made to appear to the judge before whom the case is being tried that the confession was in fact voluntarily made." Hewitt's statements, which were inadmissible as un-Mirandized illegal custodial interrogation, were also inadmissible as involuntary under HRS § 621-26.

The State bears the burden of making an affirmative showing that Hewitt's statements to the officers were voluntary. Kelekolio, 74 Haw. at 502, 849 P.2d at 69. On appeal, the court examines the totality of the circumstances including whether Hewitt received prior Miranda warnings; her mental and physical condition; whether physical punishment such as the deprivation of food or sleep had been used; the length and location of the interrogation; and Hewitt's prior experience with the criminal justice system and police interrogation. State v. Villeza, 72 Haw. 327, 331-332, 817 P.2d 1054, 1057 (1991); Kelekolio, 74 Haw. at 503, 849

P.2d at 69; Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041 (1973); Withrow v. Williams, 507 U.S. 680, 693-694, 113 S. Ct. 1745 (1993).

The evidence is uncontroverted that Hewitt was physically incapacitated. She was heavily sedated and under medical treatment for a broken breast plate. She recently suffered significant head trauma and the officers continuously woke her up and intentionally deprived her of sleep to forcibly participate in the questioning. Not only was Hewitt unable to physically walk away from the officers, but mentally, she was, by the officers own admissions, rambling, incoherent, and disoriented. She was clothed only in a hospital gown and her hospital bed was surrounded by two uniformed and armed officers at 1:00 A.M. By Officer Nacino's own testimony, he kept Hewitt awake from 1:00 A.M. to 4:00 A.M., without advising her of her Miranda rights. Although she admitted to a prior conviction for OVUII, is was four years prior to this incident and the circumstances were not known. Hewitt's statements were not knowingly or voluntarily given to the officers. Instead, the circumstances are indicative of coercive police tactics designed to manipulate and attack Hewitt when she was physically incapacitated, disoriented, injured and medicated.

Even if, however, Hewitt's statements are found to have been the result of non-custodial interrogation, they are still inadmissible under HRS § 621-26 because "[t]he requirement that a confession be voluntary reflects a recognition of the importance of free will and of reliability in determine the admissibility of a confession[.]" Colorado v. Connelly, 479 U.S. 157, 181, 107 S. Ct. 515 (1986) (Dissent, J. Brennan); see Bowe, 77 Hawaii at 57-60, 881 P.2d at 544-547 (The State has the affirmative burden to establish voluntariness, beyond showing that there was a proper Miranda warning and valid waiver of rights.); Kreps, 4 Haw. App. at 77, 661 P.2d at 715 ("In addition to the necessary waiver, the court must also find that such a statement was voluntarily made.") Based on the totality of the circumstances, Hewitt's statements, given under sedation, duress and coercion, cannot be deemed reliable or voluntary and the district court erred in finding the statements voluntary and admissible.

B. The district court erred in denying Hewitt's Motion to Suppress Evidence.

The right to be free of warrantless searches and seizures is a fundamental guarantee of our constitution.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.
>
> Haw. Const. art. I, § 7. "We have repeatedly recognized that, if anything is settled in the law of search and seizure, it is that a search without a warrant issued upon probable cause is unreasonable per se." State v. Ganal, 81 Hawaii 358, 368, 917 P.2d 370, 380 (1996).

Won, 137 Hawaii at 339, 372 P.3d at 1074 (emphasis added). Although there are a limited number of exceptions to the warrant requirement, including exigent circumstances, it is the State's burden to establish the exception. The general definition of an exigency is "when the demands of the occasion reasonably call for an immediate police response." State v. Clark, 65 Haw. 488, 494, 654 P.2d 355, 360 (1982). Specifically, it includes "situations presenting an immediate danger to life or of serious injury or an immediate threatened removal or destruction of evidence." Id. (citing State v. Dorson, 62 Haw. 377, 385, 615 P.2d 740, 746 (1980). The legislature may not establish a per se exigency by statute. McNeely, 133 S. Ct. at 1560.

Here, the blood draw was ordered and taken pursuant to HRS § 291E-21 which states in relevant part,

> **§ 291E-21. Applicable scope of part; mandatory testing in the event of a collision resulting in injury or death.**
>
> (**a**) Nothing in this part shall be construed to prevent a law enforcement officer from obtaining a sample of breath, blood, or urine, from the operator of any vehicle involved in a collision resulting in injury to or the death of any person, as evidence that the operator was under the influence of an intoxicant.
>
> * * *
>
> (**c**) In the event of a collision resulting in injury or death and if a law enforcement officer has probable cause to believe that a person involved in the collision has committed a violation of section . . . 291E-61 . . . the law enforcement officer shall request that a sample of blood or urine be recovered from the vehicle operator or any other person suspected of committing a violation of section . . . 291E-61 . . .

In Won, the Hawaii Supreme Court addressed HRS § 291E-21 and stated that "[s]uch a test does not offense the Hawaii Constitution 'so long as (1) the police have probable cause to believe that the person has committed a DUI offense and that the blood sample will evidence that

offense, (2) exigent circumstances are present, and (3) the sample is obtained in a reasonable manner.'" 137 Hawaii at 345 n. 26, 372 P.3d at 1080 n. 26 (quoting Entrekin, 98 Hawaii 221, 232, 47 P.3d 336, 347 (2002). Recently, in McNeely, the United States Supreme Court, relying on a fourth amendment analysis, held that, "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." 133 S. Ct. at 1568. Thus, under McNeely, regardless of a state's mandatory testing law, nonconsensual blood content tests violate the Fourth Amendment, absent exigent circumstances in individual OVUII cases.

Here, based on the facts of the case, the district court erred in denying the Motion to Suppress because the State failed to establish that exigent circumstances existed that justified the warrantless search. "An exigency, for the purposes of a warrantless search or seizure, exists when immediate police action is required to prevent imminent danger to life or serious damage to property, or to forestall the likely escape of a suspect or the threatened removal or destruction of evidence." State v. Przeradski, 5 Haw. App. 29, 34, 677 P.2d 471, 476 (1984) (citations omitted).

Here, the State failed to establish that there were exigent circumstances. There was no danger to life or destruction of evidence. Hewitt was immobile and sedated. The natural dissipation of alcohol does not constitute a per se exigency. McNeely, 133 S. Ct. at 1560. The district court's finding of exigency because "the special facts of this case is more in line with Schmerber" is wrong. Although Hewitt was involved in an accident, that is where the similarities between the two cases end. Unlike Schmerber, there was no danger of significant delay in the accident investigation or transportation to the hospital. McNeely, 133 S. Ct. at 1561. Similarly, the district court's reliance on the legislative intent of the statute is in direct contradiction to McNeely and offends Hewitt's rights under the Fourth Amendment.

The State failed to make any showing that a search warrant could have been timely obtained. As the Supreme Court discussed in McNeely, there have been advances since Schmerber was decided 49 years ago. There is more "expeditious processing of warrant applications, particularly in drunk-driving investigations where the evidence offered to establish probable cause is simple." 133 S. Ct. at 1561-1562. Here, there were two officers investigating the case and either of the two could have secured a warrant while the other officer continued with the investigation. Obviously, two officers were not necessary for the investigation as

Officer Sugata left early at 3:00 A.M. Similarly, HRPP 41(h) authorizes the issuance of warrants in person or by telephone.[11] A search warrant was merely a telephone call away. Both officers, who received the text from Sgt. Rose, had their cell phones available that evening.

The State failed to carry its burden to show that the warrantless search of Hewitt was justified by exigent circumstances. As the warrantless blood draw was in contradiction to Hewitt's constitutional rights under the fourth amendment to the United States Constitution and article I, § 7 of the Hawaii Constitution, Hewitt's blood alcohol content test cannot be used against her and the result must be suppressed.

C. The State failed to lay adequate foundation to admit the blood draw results.

In State v. Assaye, 121 Hawaii 204, 216 P.3d 1227, the Supreme Court addressed the foundational requirements for admissibility of a laser gun reading in an excessive speeding case. Id. at 205, 216 P.3d at 1228. The Court held that in order to admit evidence of a radar speed reading, the State must establish, at a minimum, (1) that the radar device was tested according to the manufacturer's recommended procedures and determined to be operating properly, and (2) that the nature and extent of the citing officer's training in the operation of the radar device meets the requirements indicated by the manufacturer. See Assaye, 121 Hawaii at 213-15, 216 P.3d at 1236-38. "[W]ithout a showing of the nature and extent of the 'certification,' testimony showing merely that a user is 'certified' to operate a laser gun through instruction given by a 'certified instructor' is insufficient to prove that the user is qualified by training and experience to operate the laser gun." Assaye, 121 Hawaii at 215, 216 P.3d at 1227. Absent proof of these prerequisites, there is insufficient foundation to admit an officer's testimony regarding the speed reading given by any radar device. Id. at 216, 216 P.3d 1239.

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[11] HRPP 41(h) states in relevant part:

Rule 41. Search and seizure.

* * *

(h) Warrant issuance on oral statements.
In lieu of the written affidavit required under section (c) of this rule, a sworn oral statement, in person or by telephone, may be received by the judge, which statement shall be recorded and transcribed, and such sworn oral statement shall be deemed to be an affidavit for the purposes of this rule. Alternatively to receipt by the judge of the sworn oral statement, such statement may be recorded by a court reporter who shall transcribe the same and certify the transcription. In either case, the recording and the transcribed statement shall be filed with the clerk.

Similarly, in State v. Manewa, 115 Hawaii 343, 167 P.3d 336 (2007), the Supreme Court established the general foundational requirements for the admissibility of results from scientific measuring devices. Id. The court noted that a key foundational requirement was that there was "an established manufacturer's procedure that could be conducted" to ensure that the measuring device was "in working order according to the manufacturer's specifications." Id. at 213, 216 P.3d at 1236.

Both Assaye and Manewa stand for the general evidentiary principle that the failure to lay a sound factual foundation for admission of the scientific devices precludes the admission of the result. In other words, the result cannot be relied upon as a substantive fact. Id. at 214, 216 P.3d at 1237.

1. The State failed to establish that the GCMS was tested according to the manufacturer's recommended procedures.

The State failed to lay sufficient foundation to admit the results of the blood content test because it failed to establish that the GCMS was tested according to the manufacturer's recommended procedures and determined to be operating properly. Koide testified that he performed daily maintenance on the GCMS before he conducted the test on Hewitt's blood draw. Specifically, he turned on the GCMS, checked the displays, and prepared calibrators. After he ran the calibrators, the computer software calculates the calibration. According to Koide, the GCMS was working properly and all of the parameters were acceptable when he tested Hewitt's blood. At no time did Koide indicate that the daily maintenance, calibrators preparation or testing procedures were conducted pursuant to or in accordance with the manufacturer's recommended procedures. This is unlike the situation in Manewa where an expert qualified in the field of drug analysis and identification "indicated that there was an established manufacturer's procedure that could be conducted by the user to ensure that the GCMSs were in working order according to the manufacturer's specifications." 115 Hawaii at 354, 167 P.3d at 347.

Similarly, Dr. Wong, who confirmed the results of Hewitt's blood test, did not testify that Koide's daily maintenance, calibrator preparation or testing was done pursuant to the manufacturer's recommended procedures or conducted in accordance therewith. In fact, Dr. Wong did not personally view Koide's performance of Hewitt's blood content test, but rather merely reviewed the written results. Thus, despite Dr. Wong's testimony, the same foundational

problem exists – that the State failed to lay proper foundation to establish that the GCMS was tested according to the manufacturer's recommended procedures and determined to be operating properly. The State also failed to place any operational materials or manual into evidence so that the district court could determine what the manufacturer's requirements actually were.

Accordingly, the district court erred by allowing Koide and Dr. Wong to testify as to the blood content test result.

2. The State failed to establish that the nature and extent of Koide's training in the use of the GCMS met the requirements indicated by the manufacturer.

The evidence adduced at trial was insufficient to establish that the nature and extent of Koide's training in the operation of the GCMS met the requirements indicated by the manufacturer. Assaye, 121 Hawaii at 215, 216P.3d at 1238. Koide testified that in 2008 or 2009, he was trained by Dr. Maldonaldo, a representative from the manufacturer, in the operation of the machine. The training involved a lecture and on-instrument training.

There were no evidence that Koide's training met the requirements indicated by the manufacturer. Koide failed to indicate how many hours or sessions the lecture and on-instrument training consisted of. In addition, no one testified at trial regarding the manufacturer's training requirements. Koide also failed to state that his dated training was considered current or whether his dated training was considered in good standing according to the manufacturer's requirements. Further, although he possessed a license from the State of Hawaii Department of Health to conduct blood test, he, unlike Dr. Wong, did not possess a license validating his training from the manufacturer.

Despite Dr. Wong's license and training by the manufacturer, his testimony alone was insufficient to lay proper foundation for Koide's testing of Hewitt's blood. Dr. Wong did not conduct the test and his mere review of the results cannot substitute for Koide's lack of proper and sufficient training by the manufacturer. It was Koide, not Dr. Wong, who conducted the test.

The Supreme Court has held that in order to establish that training satisfied a manufacturer's requirements, the State must provide evidence about "both (1) the training requirements set forth by the manufacturer, and (2) the training actually received by the operator of the [device]." State v. Apollonio, 130 Hawaii 353, 362, 311 P.3d 676, 685 (2013). In the instant case, there was no testimony about the specific training requirements set forth by the

manufacturer. Neither Koide, nor Dr. Wong, explained specifically what training was required the manufacturer in order to be a qualified user. The State failed to satisfy its burden of proving that Koide was qualified by the manufacturer's requirements to operate the GCMS, and the district court erred in concluding that there was sufficient foundation for the blood content results to be admitted. See Apollonio, 130 Hawaii at 362-63, 311 P.3d at 685-86.

3. The State failed to establish that the GCMS had been installed, serviced and inspected as required by the manufacturer.

In State v. Manewa, 115 Hawaii 343, 167 P.3d 336, the Supreme Court established the general foundational requirements for the admissibility of results from scientific measuring devices. In Manewa, the defendant was charged with several drug-related charges. Id. at 345, 167 P.3d at 338. A police chemist testified as to the weight of the methamphetamine recovered in the case and to the accuracy of the balance used to weigh the drug. Id. at 346-49, 167 P.3d at 339-42. The chemist testified that he believed the manufacturer's service representative calibrated the balance twice a year; however, the State failed to present any evidence that the chemist had personal knowledge that the balance had been correctly calibrated. Id. at 349, 167 P.3d at 342. On appeal, the Supreme Court concluded that, as to the reliability of the analytic balance, the evidence failed to establish (1) that the chemist had any training or expertise in calibrating the balance; (2) that the balance had been properly calibrated by the manufacturer's service representatives; (3) that there was an accepted manufacturer's established procedure for "verify[ing] and validat[ing]" that the balance was in proper working order and, that if such a procedure existed, that the chemist followed it; and (4) that his balance was in proper working order at the time the evidence was weighed. Id. at 354, 167 P.3d at 347. Because the State neither called the manufacturer's service representative to testify to the calibration of the balance nor offered any business records indicating that the balance had been correctly calibrated, the court held that an inadequate foundation was laid to show that the weight measured by the balance could be relied on as a substantive fact. Id. at 355-56, 167 P.3d at 348-49. Consequently, the court disregarded the erroneously admitted weight of the methamphetamine and held that the record was not legally sufficient to support the defendant's convictions. Id. at 357-58, 167 P.3d at 350-52.

Justice Acoba's concurring opinion in Assaye, 121 Hawaii at 216-18, 216 P.3d at 1239-41, is persuasive in its reliance on Manewa and its application to the facts of the instant case. In

Assaye, Justice Acoba indicated that Manewa "requires not only that [the State] show that there is an accepted manufacturer's procedure for ensuring that the instrument is in proper working order, but also that it show that the instrument has been inspected and serviced as required by the manufacturer." Assaye, 121 Hawaii at 217, 216 P.3d at 1240 (Acoba, J., concurring). The record in this case demonstrates that the State failed to adduce evidence sufficient to prove either prong of this test.

Although Koide testified that the GCMS is overhauled during annual maintenance, the State failed to present any evidence as to the date of the last "annual maintenance" or what manufacturer maintenance was recommended or required. The State also failed to present any evidence indicating that the GCMS had ever been inspected and serviced by the manufacturer to check the accuracy of its calibration or that any maintenance done on the device met manufacturer requirements. The State also failed to demonstrate that the device was properly installed according to manufacturer requirements. The record also lacked any evidence regarding the installation or initial calibration of the device. For all of these reasons, the State failed to meet the foundational requirement that the GCMS had been installed, inspected, and serviced in a manner directed by the manufacturer.

It is clear that the State has failed to meet the necessary foundational prerequisites in this case. The State failed to meet its burden of proving that Koide had adequate manufacturer recommended training in the operation of the GCMS. Also, there was no evidence that the GCMS was properly installed, calibrated and maintained at CLH. Additionally, the State failed to establish that the GCMS was tested according to accepted procedures and was determined to be functioning properly when Koide conducted the test. There is simply insufficient evidence to prove that important foundational procedural safeguards were followed in this case. Accordingly, there was insufficient foundation for Koide's and Dr. Wong's testimony as to the blood content test result, and Hewitt's conviction in Count I, HRS § 291E-61(a)(1), OVUII, must be reversed.

V. RELEVANT STATUTES

Relevant statutes and constitutional provisions are attached as Appendix "A."

VI. CONCLUSION

Based on the foregoing arguments and authorities cited, Defendant-Appellant Cyrina Hewitt, respectfully requests that this Honorable Court reverse her convictions and sentences.

DATED: Honolulu, Hawaii, November 14, 2016.

Respectfully submitted,
OFFICE OF THE PUBLIC DEFENDER
JOHN M. TONAKI, PUBLIC DEFENDER
BY: /s/ Taryn R. Tomasa
TARYN R. TOMASA
DEPUTY PUBLIC DEFENDER
ATTORNEY FOR APPELLANT

APPENDIX "A"

HRS § 1-15. Construction of ambiguous context.

Where the words of a law are ambiguous:

(1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

(2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.

(3) Every construction which leads to an absurdity shall be rejected.

HRS § 1-16. Laws in pari materia.

Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.

HRS § 286-102. Licensing.

(a) No person, except one:

(1) Exempted under section 286-105;

(2) Who holds an instruction permit under section 286-110;

(3) Who holds a limited purpose driver's license, limited purpose provisional driver's license, or limited purpose instruction permit under section 286-104.5;

(4) Who holds a provisional license under section 286-102.6;

(5) Who holds a commercial driver's license issued under section 286-239; or

(6) Who holds a commercial driver's license instruction permit issued under section 286-236, shall operate any category of motor vehicles listed in this section without first being appropriately examined and duly licensed as a qualified driver of that category of motor vehicles.

(b) A person operating the following category or combination of categories of motor vehicles shall be examined as provided in section 286-108 and duly licensed by the examiner of drivers:

(1) Mopeds;

(2) Motorcycles and motor scooters;

(3) Passenger cars of any gross vehicle weight rating, buses designed to transport fifteen or fewer occupants, and trucks and vans having a gross vehicle weight rating of eighteen thousand pounds or less; and

(4) All of the motor vehicles in category (3) and any vehicle that is not a commercial motor vehicle.

A school bus or van operator shall be properly licensed to operate the category of vehicles that the operator operates as a school bus or van and shall comply with the standards of the department of transportation as provided by rules adopted pursuant to section 286-181.

(c) No person shall receive a driver's license without surrendering to the examiner of drivers all valid driver's licenses and all valid identification cards in the person's possession. All licenses and identification cards so surrendered shall be shredded; provided that with the exception of driver's licenses issued by any Canadian province, a foreign driver's license may be returned to the owner after being invalidated pursuant to issuance of a Hawaii license; provided further that the examiner of drivers shall notify the authority that issued the foreign license that the license has been invalidated and returned because the owner is now licensed in this State; and provided

further that all commercial driver's licenses that are surrendered shall be shredded. No person shall be permitted to hold more than one valid driver's license at any time.

(d) Before issuing a driver's license, the examiner of drivers shall complete a check of the applicant's driving record to determine whether the applicant is subject to any disqualification under section 286-240, or any license suspension, revocation, or cancellation, and whether the applicant has a driver's license from more than one state or jurisdiction. The record check shall include but is not limited to the following:

(1) A check of the applicant's driving record as maintained by the applicant's state or jurisdiction of licensure;

(2) A check with the commercial driver license information system;

(3) A check with the National Driver Register; and

(4) If the driver is renewing a commercial driver's license for the first time after September 30, 2002, a request for the applicant's complete driving record from all states where the applicant was previously licensed to drive any motor vehicle over the last ten years; provided that a notation is made on the driving record confirming the check has been made and the date it was done.

(e) Notwithstanding sections 291E-61.6 and 291-44.5, in addition to other qualifications and conditions by or pursuant to this subpart, the right of an individual to hold a motor vehicle operator's license or permit issued by the county is subject to the requirements of section 576D-13.

Upon receipt of certification from the child support enforcement agency pursuant to section 576D-13 that an obligor or individual who owns or operates a motor vehicle is not in compliance with an order of support as defined in section 576D-1 or has failed to comply with a subpoena or warrant relating to a paternity or child support proceeding, the examiner of drivers shall suspend the license and right to operate motor vehicles and confiscate the license of the obligor. The examiner of drivers shall not reinstate an obligor's or individual's license until the child support enforcement agency, the office of child support hearings, or the family court issues an authorization that states the obligor or individual is in compliance with an order of support or has complied with a subpoena or warrant relating to a paternity or child support hearing.

The licensing authority may adopt rules pursuant to chapter 91 to implement and enforce the requirements of this section.

HRS § 291E-21. Applicable scope of part; mandatory testing in the event of a collision resulting in injury or death.

(a) Nothing in this part shall be construed to prevent a law enforcement officer from obtaining a sample of breath, blood, or urine, from the operator of any vehicle involved in a collision resulting in injury to or the death of any person, as evidence that the operator was under the influence of an intoxicant.

(b) If a health care provider who is providing medical care, in a health care facility, to any person involved in a vehicle collision:

(1) Becomes aware, as a result of any blood or urine test performed in the course of medical treatment, that:

(A) The alcohol concentration in the person's blood meets or exceeds the amount specified in section 291E-61(a)(4) or 291E-61.5(a)(2)(D); or

(B) The person's blood or urine contains one or more drugs that are capable of impairing a person's ability to operate a vehicle in a careful and prudent manner; and

(2) Has a reasonable belief that the person was the operator of a vehicle involved in the collision,

the health care provider shall notify, as soon as reasonably possible, any law enforcement officer present at the health care facility to investigate the collision. If no law enforcement officer is present, the health care provider shall notify the county police department in the county where the collision occurred. If the health care provider is aware of any blood or urine test result, as provided in paragraph (1), but lacks information to form a reasonable belief as to the identity of the operator involved in a vehicle collision, as provided in paragraph (2), then the health care provider shall give notice to a law enforcement officer present or to the county police department, as applicable, for each person involved in a vehicle collision whose alcohol concentration in the person's blood meets or exceeds the amount specified in section 291E-61(a)(4) or 291E-61.5(a)(2)(D) or whose blood or urine contains one or more drugs. The notice by the health care provider shall consist of the name of the person being treated, the blood alcohol concentration or drug content disclosed by the test, and the date and time of the administration of the test. This notice shall be deemed to satisfy the intoxication element necessary to establish the probable cause requirement set forth in subsection (c).

(c) In the event of a collision resulting in injury or death and if a law enforcement officer has probable cause to believe that a person involved in the collision has committed a violation of section 707-702.5, 707-703, 707-704, 707-705, 707-706, 291E-61, 291E-61.5, or 291E-64, the law enforcement officer shall request that a sample of blood or urine be recovered from the vehicle operator or any other person suspected of committing a violation of section 707-702.5, 707-703, 707-704, 707-705, 707-706, 291E-61, 291E-61.5, or 291E-64. If the person involved in

the collision is not injured or refuses to be treated for any injury, the law enforcement officer may offer the person a breath test in lieu of a blood or urine test. If the person declines to perform a breath test, the law enforcement officer shall request a blood or urine sample pursuant to subsection (d). The act of declining to perform a breath test under this section shall not be treated as a refusal under chapter 291E and shall not relieve the declining person from the requirement of providing a blood or urine sample under this section.

(d) The law enforcement officer shall make the request under subsection (c) to the hospital or medical facility treating the person from whom the blood or urine is to be recovered. If the person is not injured or refuses to be treated for any injury, the law enforcement officer shall make the request of a blood or urine sample under subsection (c) to a person authorized under section 291E-12; provided that a law enforcement officer may transport that person to another police facility or a hospital or medical facility that is capable of conducting a breath, blood, or urine test. Upon the request of the law enforcement officer that blood or urine be recovered pursuant to this section, and except where the person to perform the withdrawal of a blood sample or to obtain a urine sample or the responsible attending personnel at the hospital or medical facility determines in good faith that recovering or attempting to recover blood or urine from the person presents an imminent threat to the health of the medical personnel or others, the person authorized under section 291E-12 shall:

(1) Recover the sample in compliance with section 321-161; and

(2) Provide the law enforcement officer with the blood or urine sample requested.

(e) Any person complying with this section shall be exempt from liability pursuant to section 663-1.9 as a result of compliance.

(f) As used in this section, unless the context otherwise requires:

"Health care facility" includes any program, institution, place, building, or agency, or portion thereof, private or public, whether organized for profit or not, that is used, operated, or designed to provide medical diagnosis, treatment, or rehabilitative or preventive care to any person. The term includes health care facilities that are commonly referred to as hospitals, outpatient clinics, organized ambulatory health care facilities, emergency care facilities and centers, health maintenance organizations, and others providing similarly organized services regardless of nomenclature.

"Health care provider" means a person who is licensed, certified, or otherwise authorized or permitted by law to administer health care in the ordinary course of business or practice of a profession.

HRS § 291E-61. Operating a vehicle under the influence of an intoxicant.

(a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:

(1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;

(2) While under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner;

(3) With .08 or more grams of alcohol per two hundred ten liters of breath; or

(4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

(b) A person committing the offense of operating a vehicle under the influence of an intoxicant shall be sentenced without possibility of probation or suspension of sentence as follows:

(1) For the first offense, or any offense not preceded within a five-year period by a conviction for an offense under this section or section 291E-4(a):

(A) A fourteen-hour minimum substance abuse rehabilitation program, including education and counseling, or other comparable program deemed appropriate by the court;

(B) One-year revocation of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;

(C) Any one or more of the following:

(i) Seventy-two hours of community service work;

(ii) Not less than forty-eight hours and not more than five days of imprisonment; or

(iii) A fine of not less than $ 150 but not more than $ 1,000;

(D) A surcharge of $ 25 to be deposited into the neurotrauma special fund; and

(E) A surcharge, if the court so orders, of up to $ 25 to be deposited into the trauma system special fund;

(2) For an offense that occurs within five years of a prior conviction for an offense under this

section or section 291E-4(a):

(A) Revocation for not less than eighteen months nor more than two years of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;

(B) Either one of the following:

(i) Not less than two hundred forty hours of community service work; or

(ii) Not less than five days but not more than thirty days of imprisonment, of which at least forty-eight hours shall be served consecutively;

(C) A fine of not less than $ 500 but not more than $ 1,500;

(D) A surcharge of $ 25 to be deposited into the neurotrauma special fund; and

(E) A surcharge of up to $ 50 if the court so orders, to be deposited into the trauma system special fund;

(3) For an offense that occurs within five years of two prior convictions for offenses under this section or section 291E-4(a):

(A) A fine of not less than $ 500 but not more than $ 2,500;

(B) Revocation for two years of license and privilege to operate a vehicle during the revocation period and installation during the revocation period of an ignition interlock device on any vehicle operated by the person;

(C) Not less than ten days but not more than thirty days imprisonment, of which at least forty-eight hours shall be served consecutively;

(D) A surcharge of $ 25 to be deposited into the neurotrauma special fund; and

(E) A surcharge of up to $ 50 if the court so orders, to be deposited into the trauma system special fund;

(4) In addition to a sentence imposed under paragraphs (1) through (3), any person eighteen years of age or older who is convicted under this section and who operated a vehicle with a passenger, in or on the vehicle, who was younger than fifteen years of age, shall be sentenced to an additional mandatory fine of $ 500 and an additional mandatory term of imprisonment of forty-eight hours; provided that the total term of imprisonment for a person convicted under this paragraph shall not exceed the maximum term of imprisonment provided in paragraph (1), (2), or

(3), as applicable. Notwithstanding paragraphs (1) and (2), the revocation period for a person sentenced under this paragraph shall be not less than two years; and

(5) If the person demonstrates to the court that the person:

(A) Does not own or have the use of a vehicle in which the person can install an ignition interlock device during the revocation period; or

(B) Is otherwise unable to drive during the revocation period,

the person shall be absolutely prohibited from driving during the period of applicable revocation provided in paragraphs (1) to (4); provided that the court shall not issue an ignition interlock permit pursuant to subsection (i) and the person shall be subject to the penalties provided by section 291E-62 if the person drives during the applicable revocation period.

(c) Except as provided in sections 286-118.5 and 291E-61.6, the court shall not issue an ignition interlock permit to:

(1) A defendant whose license is expired, suspended, or revoked as a result of action other than the instant offense;

(2) A defendant who does not hold a valid license at the time of the instant offense;

(3) A defendant who holds either a category 4 license under section 286-102(b) or a commercial driver's license under section 286-239(a), unless the ignition interlock permit is restricted to a category 1, 2, or 3 license under section 286-102(b); or

(4) A defendant who holds a license that is a learner's permit or instruction permit.

(d) Except as provided in subsection (c), the court may issue a separate permit authorizing a defendant to operate a vehicle owned by the defendant's employer during the period of revocation without installation of an ignition interlock device if the defendant is gainfully employed in a position that requires driving and the defendant will be discharged if prohibited from driving a vehicle not equipped with an ignition interlock device.

(e) A request made pursuant to subsection (d) shall be accompanied by:

(1) A sworn statement from the defendant containing facts establishing that the defendant currently is employed in a position that requires driving and that the defendant will be discharged if prohibited from driving a vehicle not equipped with an ignition interlock device; and

(2) A sworn statement from the defendant's employer establishing that the employer will, in fact, discharge the defendant if the defendant is prohibited from driving a vehicle not equipped with an ignition interlock device and identifying the specific vehicle and hours of the day, not to

exceed twelve hours per day, the defendant will drive for purposes of employment.

(f) A permit issued pursuant to subsection (d) shall include restrictions allowing the defendant to drive:

(1) Only during specified hours of employment, not to exceed twelve hours per day, and only for activities solely within the scope of the employment;

(2) Only the vehicle specified; and

(3) Only if the permit is kept in the defendant's possession while operating the employer's vehicle.

(g) Notwithstanding any other law to the contrary, any:

(1) Conviction under this section, section 291E-4(a), or section 291E-61.5;

(2) Conviction in any other state or federal jurisdiction for an offense that is comparable to operating or being in physical control of a vehicle while having either an unlawful alcohol concentration or an unlawful drug content in the blood or urine or while under the influence of an intoxicant or habitually operating a vehicle under the influence of an intoxicant; or

(3) Adjudication of a minor for a law violation that, if committed by an adult, would constitute a violation of this section or an offense under section 291E-4(a), or section 291E-61.5,

shall be considered a prior conviction for the purposes of imposing sentence under this section. Any judgment on a verdict or a finding of guilty, a plea of guilty or nolo contendere, or an adjudication, in the case of a minor, that at the time of the offense has not been expunged by pardon, reversed, or set aside shall be deemed a prior conviction under this section. No license and privilege revocation shall be imposed pursuant to this section if the person's license and privilege to operate a vehicle has previously been administratively revoked pursuant to part III for the same act; provided that, if the administrative revocation is subsequently reversed, the person's license and privilege to operate a vehicle shall be revoked as provided in this section. There shall be no requirement for the installation of an ignition interlock device pursuant to this section if the requirement has previously been imposed pursuant to part III for the same act; provided that, if the requirement is subsequently reversed, a requirement for the installation of an ignition interlock device shall be imposed as provided in this section.

(h) Whenever a court sentences a person pursuant to subsection (b), it also shall require that the offender be referred to the driver's education program for an assessment, by a certified substance abuse counselor, of the offender's substance abuse or dependence and the need for appropriate treatment. The counselor shall submit a report with recommendations to the court. The court shall require the offender to obtain appropriate treatment if the counselor's assessment establishes the offender's substance abuse or dependence. All costs for assessment and treatment

shall be borne by the offender.

(i) Upon proof that the defendant has:

(1) Installed an ignition interlock device in any vehicle the defendant operates pursuant to subsection (b); and

(2) Obtained motor vehicle insurance or self-insurance that complies with the requirements under either section 431:10C-104 or section 431:10C-105,

the court shall issue an ignition interlock permit that will allow the defendant to drive a vehicle equipped with an ignition interlock device during the revocation period.

(j) Notwithstanding any other law to the contrary, whenever a court revokes a person's driver's license pursuant to this section, the examiner of drivers shall not grant to the person a new driver's license until the expiration of the period of revocation determined by the court. After the period of revocation is completed, the person may apply for and the examiner of drivers may grant to the person a new driver's license.

(k) Any person sentenced under this section may be ordered to reimburse the county for the cost of any blood or urine tests conducted pursuant to section 291E-11. The court shall order the person to make restitution in a lump sum, or in a series of prorated installments, to the police department or other agency incurring the expense of the blood or urine test. Except as provided in section 291E-5, installation and maintenance of the ignition interlock device required by subsection (b) shall be at the defendant's own expense.

(*l*) As used in this section, the term "examiner of drivers" has the same meaning as provided in section 286-2.

HRS § 621-26. Confessions when admissible.

No confession shall be received in evidence unless it is first made to appear to the judge before whom the case is being tried that the confession was in fact voluntarily made.

HRPP Rule 12. Pleadings and motions before trial; defenses and objections.

(a) Pleadings and motions.

Pleadings in penal proceedings shall be the charge, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial motions.

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) defenses and objections based on defects in the institution of the prosecution;

(2) defenses and objections based on defects in the charge (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

(3) motions to suppress evidence or for return of property;

(4) requests for discovery under Rule 16;

(5) requests for consolidation or severance of charges or defendants under Rules 13 and 14;

(6) motions to dismiss under Rule 8(c) for failure to join related offenses; and

(7) motions to transfer under Rule 21.

(c) Motion date.

Pretrial motions and requests must be made within 21 days after arraignment unless the court otherwise directs.

(d) Notice by the prosecution of the intention to use evidence.

(1) At the discretion of the prosecution.

At the arraignment or as soon thereafter as is practicable, the prosecution may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subsection (b)(3) of this rule.

(2) At the request of the defendant.

At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the prosecution's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on motion.

A motion made before trial shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue or until after verdict; provided that a motion to suppress made before trial shall be determined before trial. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of failure to raise defenses or objections.

Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, within the time set by the court pursuant to section (c), or within any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Effect of determination.

If the court grants a motion based on a defect in the institution of the prosecution or in the charge, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time pending the filing of a new charge. Nothing in this rule shall be deemed to affect provisions of any statute relating to periods of limitations.

HRPP Rule 41. Search and seizure.

(a) Authority to issue warrant.

Except as otherwise provided by statute, a search warrant may be issued by any district or circuit judge (1) within the circuit wherein the property sought is located; or (2) within the circuit where the property is anticipated to be located. Application therefor should be made to a district judge wherever practicable.

(b) Property which may be seized with a warrant.

A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of an offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing an offense. The term "property" includes documents, books, papers, any other tangible objects, and information.

(c) Issuance and contents.

A warrant shall issue only on an affidavit or affidavits sworn to before the judge and establishing the grounds for issuing the warrant. If the judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, the judge shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a police officer or some other officer authorized to enforce or assist in enforcing any law of the State of Hawai'i or any political subdivision thereof. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall contain a prohibition against execution of the warrant between 10:00 p.m. and 6:00 a.m., unless the judge permits execution during those hours in writing on the warrant. A warrant may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing a warrant that authorizes the seizure of electronic storage media or the seizure or copying of electronically stored information refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review. The warrant shall designate the judge to whom it shall be returned.

(d) Execution and return with inventory.

The officer taking property under the warrant shall give to the person from whom or from whose

premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request cause to be delivered a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(e) Motion to return property.

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move the court having jurisdiction to try the offense for the return of the property. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned unless otherwise subject to lawful detention, but the judge may impose reasonable conditions to protect access to the property and its use in later proceedings.

(f) Motion to suppress.

A person aggrieved by an unlawful search and seizure of property may move the court having jurisdiction to try the offense to suppress for use as evidence by the State anything unlawfully obtained. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall not be admissible in the State's evidence at any hearing or trial.

(g) Return of documents to clerk.

The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other documents in connection therewith and shall file them with the clerk of the court having jurisdiction of the case.

(h) Warrant issuance on oral statements.

In lieu of the written affidavit required under section (c) of this rule, a sworn oral statement, in person or by telephone, may be received by the judge, which statement shall be recorded and transcribed, and such sworn oral statement shall be deemed to be an affidavit for the purposes of this rule. Alternatively to receipt by the judge of the sworn oral statement, such statement may be

recorded by a court reporter who shall transcribe the same and certify the transcription. In either case, the recording and the transcribed statement shall be filed with the clerk.

(i) Duplicate warrants on oral authorization.

The judge may orally authorize a police officer to sign the signature of the judge on a duplicate original warrant, which shall be deemed to be a valid search warrant for the purposes of this rule. The judge shall enter on the face of the original warrant the exact time of issuance and shall sign and file the original warrant and, upon its return, the duplicate original warrant with the clerk.

(j) Scope.

This rule does not modify any statute or ordinance, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made.

United States Constitutional Amendments

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawaii State Constitution

Article I, § 5

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Article I, § 7

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Article I, § 14

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused; to have compulsory process for obtaining witnesses in the accused's favor; and to have the assistance of counsel for the accused's defense. Juries, where the crime charged is serious, shall consist of twelve persons. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment.

APPENDIX "B"

STATE OF HAWAI'I, Plaintiff-Appellant, v. PIYON CHO, Defendant-Appellee.

NO. CAAP-14-0000081

INTERMEDIATE COURT OF APPEALS OF HAWAI'I

135 Haw. 406; 353 P.3d 409; 2015 Haw. App. LEXIS 248

May 27, 2015, Decided
May 27, 2015, Filed

NOTICE: PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

PUBLISHED IN TABLE FORMAT IN THE HAWAII REPORTER.

PRIOR HISTORY: [*1] APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT. (CR. NO. 13-1-0220).

COUNSEL: On the briefs: Jefferson R. Malate, Deputy Prosecuting Attorney, Office of the Prosecuting Attorney, County of Hawai'i, for Plaintiff-Appellant.

Gerard D. Lee Loy, for Defendant-Appellee.

JUDGES: By: Foley, Presiding Judge, Reifurth and Ginoza, JJ.

OPINION

SUMMARY DISPOSITION ORDER

Plaintiff-Appellant State of Hawai'i (State) appeals from the "Findings of Fact; Conclusions of Law; and Order Denying Motion to Determine Voluntariness," entered on December 6, 2013, in the Circuit Court of the Third Circuit (circuit court).[1]

1 The Honorable Glenn S. Hara presided.

On March 7, 2013, Defendant-Appellee Piyon Cho (Cho) was charged with Assault in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 707-712(1)(a) (2014).[2] Before trial, the State filed a "Motion to Determine Voluntariness of Statements to the Police by Defendant" (Motion to Determine Voluntariness) seeking to establish the admissibility of allegedly incriminating statements made by Cho.

2 The State's complaint against Cho alleges that she "intentionally, knowingly and/or recklessly caused bodily injury to another person, JAMES FERREIRA SR."

HRS § 707-712 (1) (a) provides in pertinent part:

> §707-712(1) (a) Assault in the third degree. (1) A person commits

[*2] the offense of assault in the third degree if the person:

> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person[.]

On appeal, the State's sole point of error is that the circuit court erred in denying its Motion to Determine Voluntariness because it misapplied the law. After a careful review of the issues raised and the arguments made by the parties, the record and applicable authority, we resolve the State's point of error as follows and affirm.

A hearing on the State's Motion to Determine Voluntariness was held on October 31, 2013, during which the only witness called was Officer Chuck Cobile (Officer Cobile). Officer Cobile testified that on July 25, 2012, he responded to a report of possible harassment, involving several male parties who allegedly pushed a female party, at a bar in Hilo, Hawai'i. When Officer Cobile arrived on the scene, he initially made contact with Cho, who at that point, he believed to be the victim. Because Officer Cobile did not consider Cho a suspect, he did not administer any Miranda[3] warnings before interviewing Cho about the incident. Cho made several statements, including that she "got into a dispute with her husband[]" and "had

[*3] punched her husband."

3 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

After discovering that another party wanted to make a counter-complaint against Cho, Officer Cobile interviewed her again, but administered the "Hawaii Police Department Advice of Rights" (Advice of Rights) form beforehand this time. Cho indicated that she understood her rights by signing her initials. Officer Cobile testified that Cho explained she "was upset at the time and she was in the room and she was trying to get past the, uh, male parties and . . . he wouldn't let her pass." According to Officer Cobile, Cho "stated that she was swinging her arms, but they were keeping her from leaving the room. 11 In addition, Officer Cobile testified that Cho said "[s]omething to the effect of you wanna fight wit' me then I'll fight wit' you."

In determining the voluntariness of Cho's statements to Officer Cobile, the circuit court evaluated the "totality of circumstances" in accordance with the due process analysis in State v. Bowe, 77 Hawai'i 51, 60, 881 P.2d 538, 547 (1994), including whether the statements were induced by coercion. The circuit court ruled that the State failed to adduce sufficient evidence from which the court could find voluntariness. The circuit court concluded that " [b]ased on the testimony of Officer Cobile, . . . no

[*4] evidence was produced which indicated that the statements made by Defendant Cho (both before and after the advisement of her rights) were voluntarily made."

We review the circuit court's pretrial findings of fact under the clearly erroneous standard and its conclusions of law under the right/wrong standard. State v. Naititi, 104 Hawai'i 224, 232-33, 87 P.3d 893, 901-02 (2004).

Based on the State's failure to meet its burden on its own motion, we conclude that the circuit court did not err. HRS § 621-26 (1993) mandates that " [n]o confession shall be received in evidence unless it is first made to appear to the judge before whom the case is being' tried that the confession was in fact voluntarily made."[4] Important for purposes of this case, "[t]he burden is on the prosecution to show that the statement was voluntarily given and not the product of coercion." State v. Kelekolio, 74 Haw. 479, 502, 849 P.2d 58, 69 (1993) (emphasis added) . " [T]he issue of voluntariness must be resolved by evaluating the 'totality of the circumstances' surrounding the making of the statement . . . ." Bowe, 77 Hawai'i at 60, 881 P.2d at 547.

4 None of the parties challenge the implicit conclusion that Cho's statements constitute a "confession," and thus we do not address the issue.

Regarding Cho's initial statements to Officer Cobile, the State asserts on appeal that the circuit court misapplied the law

[*5] by insisting "that even if Miranda warnings were not required, [the State] still needed to show that [Cho's] initial statement wasn't coerced[]" and that there is nothing in the record demonstrating any coercion. Putting the Miranda issue aside, the Hawai'i Supreme Court has stated that "independent constitutional considerations arising under article I, sections 5 and 10 of the Hawai'i Constitution compel us to hold that the coercive conduct . . . may be sufficient to render a Defendant's confession involuntary." Bowe, 77 Hawai'i at 57, 881 P. 2d at 544 (emphasis added). In this case, the State failed to meet its burden because it did not provide sufficient evidence as to the circumstances surrounding Cho's statements, so as to enable the circuit court to conclude, from the totality of the circumstances, that her statements were voluntarily made and that there was no coercion involved.

Turning to Cho's statements given during Officer Cobile's second round of questioning, after Miranda warnings were administered and Cho waived her rights, the State similarly argues that the circuit court erred because the lack of demonstrated coercion indicates that the statements were voluntary. However, the State has the affirmative burden to establish voluntariness, beyond showing that

[*6] there was a proper Miranda warning and valid waiver of rights. See Bowe, 77 Hawai'i at 57-60, 881 P.2d at 544-47; State v. Kreps, 4 Haw. App. 72, 77, 661 P.2d 711, 715 (1983) ("In addition to the necessary waiver the court must also find that such a statement was voluntarily made."). Again, the State failed to provide any meaningful evidence regarding the circumstances of Cho's statements.

As noted, the only witness called by the State was Officer Cobile. At no time did the State ask Officer Cobile to describe the circumstances surrounding his questioning of Cho, and at no time did Officer Cobile attest to the voluntariness of Cho's statements. At most, Officer Cobile testified that upon arriving at the scene and first making contact with Cho, she "was outside along with some other people" and he could tell that English was not her native language because she had a strong accent. The State failed to admit Officer Cobile's official report of the incident into evidence, admitting only the Advice of Rights form signed by Cho.

On this record, under the Hawai'i Supreme Court's holding in Bowe, and in light of the State's failure to produce evidence showing voluntariness, the circuit court did not err in concluding that there was insufficiency of proof as to the issue of voluntariness.

Therefore,

[*7] IT IS HEREBY ORDERED that the Findings of Fact; Conclusions of Law; and Order Denying Motion to Determine Voluntariness entered on December 6, 2013, in the Circuit Court of the Third Circuit, are affirmed.

DATED: Honolulu, Hawai'i, May 27, 2 015.

/s/ Daniel R. Foley

Presiding Judge

/s/ Lawrence M. Reifurth

Associate Judge

/s/ Lisa M. Ginoza

Associate Judge

STATEMENT OF RELATED CASES

There are no cases that are known to be related and pending in the Hawaii courts or agencies.