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

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. ARGUMENT

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

In its answering brief, the State argues that Hewitt's statements to the police were not the product of custodial interrogation. In support of its argument, the State argues that Hewitt was not in custody because "she was not chained to the bed[.]" Answering Brief ("AB): 6. Contrary to the State's assertion, the present state of the law does not require that Hewitt be physically restrained to be considered in custody. Rather, the appropriate test that the State chooses to ignore is whether Hewitt was "otherwise deprived of [her] freedom of action in any significant way." State v. Melemai, 64 Haw. 479, 480, 643 P.2d 541, 543 (1982).

The State failed to address the undisputed facts that Hewitt was unable to leave because the uniformed officers, with their side arms, surrounded Hewitt's bed while she was clothed in only a hospital gown, prone in a hospital bed with a broken breast plate, and who, according to Officer Nacino, was disoriented, "incoherent" and not even aware that Officer Sugata had taken her photograph. Also significant, and utterly ignored by the State, was the fact that Hewitt could not leave because Officer Nacino served Hewitt with a legal document from an unrelated case. Based on the totality of the circumstances, Hewitt was in custody for purposes of custodial interrogation. See Opening Brief ("OB") at 23-25.

The State also claimed that the officers' questioning of Hewitt was an "investigative stop" with "brief[ ]" questioning that "ceased" "[o]nce incriminating evidence arose against [Hewitt.]" AB at 8. The State is wrong on all accounts.

The officers' questioning of Hewitt did not constitute an "investigative stop." A warrantless seizure is presumed invalid "unless and until the prosecution proves that the . . . seizure falls within a well-recognized and narrowly defined exception to the warrant requirement." State v. Eleneki, 106 Hawaii 177, 180, 102 P.3d 1075, 1078 (2004) (citation omitted). In order to justify an investigative stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21, 88 S. Ct. 1868. Notably, the Hawaii Supreme Court has noted that the constitutional protection against warrantless seizures "does not permit the stopping of potential witnesses to the same extent those suspected of crime." Eleneki, 106

Hawaii at 183, 102 P.3d at 1081 (citing People v. Spencer, 646 N.E.2d 785, 789, 622 N.Y.S.2d 483 (N.Y. 1995) (quoting 3 Lafave, Search and Seizure §9.2[b] at 354 [2d ed.]).

Here, the officers failed to articulate any fact or facts indicating a specific articulable basis that criminal activity was afoot. Rather, the evidence suggested that Hewitt may have been the victim of an assault, in other words, a witness, who under the circumstances of the case, the police were not lawfully permitted to detain and subject to prolonged questioning. Id.

The State is also wrong in its assertions that the officers' questioning was brief and stopped once incriminating evidence against Hewitt arose. The officers' testimony indicates that they were questioning Hewitt for three hours, which is far from "brief." Furthermore, after Officer Nacino received confirmation that Hewitt's identification was located in the sole vehicle involved in a nearby traffic accident, contrary to the State's claim, the officers' questioning of Hewitt did not cease. Rather, Officer Nacino, who already suspected that Hewitt was under the influence of an intoxicant, asked her if she was driving that vehicle. The only purpose of the question was for Hewitt to incriminate herself. Only after Officer Nacino elicited Hewitt's confession did his questioning cease. The State's assertion that the officers' contact with Hewitt was a brief investigatory stop not designed to elicit an incriminating response is disingenuous.

Similarly, the State argues that Hewitt's testimony that she kept falling asleep is contrary to her testimony that she was sedated. All of the witnesses' testimony support Hewitt's testimony. Hewitt testified that she was under sedation, which is defined as "the calming of mental excitement or abatement of physiological function, especially by the administration of a drug[,]" for her numerous injuries including a broken breast plate. Dictionary.com, http://dictionary.com /browse/sedation (defining "sedation") (last accessed February 8, 2017). The officers testified that when they made contact with Hewitt at 1:00 A.M., she was incoherent, lying down in the hospital bed and not aware that the officer had taken her photograph. The officers' testimony also supports the fact that Hewitt was sedated with medication and falling asleep. A female clothed in only a hospital gown who is being surrounded and questioned by male police officers will not remain prone in a hospital bed unless she is physically unable to remain conscious.

The State points out that Hewitt, in her opening brief, misidentified "Officer Chandler" as not testifying at the hearing on the Motion to Suppress. The State is correct in so far as it was Officer Sugata, who did not testify at the hearing, Officer Chandler. Although the wrong officer

was identified, the argument remains the same. Officer Nacino's testimony from the suppression hearing and trial differed from Officer Sugata's trial testimony. For example, Officer Nancio failed to mention at the suppression hearing that he suspected that Hewitt was under the influence of an intoxicant and he never mentioned that he was previously informed of the traffic accident at the beginning of his shift. Officer Sugata's testimony also differed from Officer Nacino's in the statements allegedly uttered by Hewitt. Officer Sugata mentioned five to six statements whereas Officer Nacino offered three differing statements in the suppression hearing and trial testimony. One statement in particular, relating to Hewitt "being able to handle her own shit," Officer Nacino only mentioned at trial. Despite the discrepancies, the trial court found the officers to be "very credible" which, logically, is not reconcilable.

The State's reliance on State v. Antone, 62 Haw. 346, 615 P.2d 101 (1980), for the proposition that "it is well established that a judge is presumed not to be influenced by incompetent evidence" because "the judge in the present case did not view the statements by [Hewitt] to Officer Nacino as incompetent evidence" is meaningless. The State's argument that the trial court properly relied upon the improper evidence because it did not view the evidence as improper is a circular and inane argument. Here, the district court erred in admitting Hewitt's statements and the results of the warrantless blood draw as fruit of the illegally-obtained statements. See OB at 21-27.

B. The district court erred in denying the Motion to Suppress Evidence.

It is incredulous for the State to argue that, "[t]he very real danger of further delays for the purposes of getting a warrant would have resulted in the loss of even more evidence than had already been lost." AB at 10. First, there is no basis in the record for the State to claim that there was any dissipation of Hewitt's blood alcohol content, significant or otherwise. Dr. Wong testified that the reduction of alcohol in the blood depends on a variety of factors *none of which he examined in this case*. JEFS: 20: 149.

Second, the State fails to articulate *any* basis supporting that there would have been any delay, significant or otherwise, in obtaining a warrant. Thus, it is no surprise that the State ignores Missouri v. McNeely, -- U.S. --, 133 S. Ct. 1552, 1561-1562, 2013 LEXIS 3160 (2013), in which the United States Supreme Court recognized the technological advances from 51 years ago where there is now an "expeditious processing of warrant applications, particularly in drunk-driving investigations where the evidence offered to establish probable cause is simple." Cf.

Schmerber v. California, 384 U.S. 757, 770, 86 S. Ct. 1826 (1966) (A driving while intoxicated suspect's warrantless blood test result was upheld as admissible where the officer "might reasonable have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threated 'the destruction of evidence[.]") The discussion of the technological advances distinguishes and discounts the applicability of Schmerber to the instant case.

Most significantly, other than stating that the dissipation of Hewitt's BAC constituted exigent circumstances, which McNeely, *supra*, directly contradicts, the State fails to establish exigent circumstances that permitted Hewitt's warrantless search and seizure. Although the State attempts to argue that the instant case is factually similar to Schmerber, it is clear that the two cases are distinguishable. Unlike the facts in Schmerber, Hewitt was already at the hospital undergoing medical treatment when the officers came into contact with her. There was no delay in waiting for the officers to respond to the scene of the auto accident. There was no delay in waiting for an ambulance to arrive at the scene. There was no delay for Hewitt's transportation to the hospital. Any investigation conducted was quick and expedited by the use of the officers' cell phones and text messaging. The same cell phones and technology that any of the officers could have used to obtain a search warrant. Schmerber and the instant case are nothing alike. Here, the State failed to carry its burden and the district court erred in admitting the results of the warrantless blood draw. State v. Entrekin, 98 Hawaii 221, 232, 47 P.3d 336, 347 (2002). It follows that the results of the warrantless blood draw must be suppressed, and Hewitt's conviction in Count I must be reversed.

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

The State acknowledges and admits that there was no evidence that Kiode received training in accordance with the manufacturer's recommendations and requirements. AB at 12. Instead, the State requests that the foundational requirement be "reasonably inferred" from the record. Id. Foundational requirements to admit scientific evidence cannot be reasonably inferred. See State v. Manewa, 115 Hawaii 343, 355, 167 P.3d 336, 348 (holding that the analyst's "assumption that the [analytical] balance was accurate" was insufficient because he "lacked the personal knowledge that the balance had been correctly calibrated and merely assumed that the manufacturer's service representative had done so"). Recent cases on the foundational requirements for the admissibility of the results from scientific devices, State v

Assaye, 121 Hawaii 204, 216 P.3d 1227 (2009), and State v. Apollonio, 130 Hawaii 353, 311 P.3d 676 (2013), along with Manewa, *supra*, all require the proponent of the evidence must lay the proper foundation for the results of scientific devices to be admissible. This includes foundational requirements regarding the operator of the scientific devices. Here, by the State's own admission, the proper foundation was not laid, and the blood test cannot be deemed reliable and was thereby inadmissible. As a result, Hewitt's conviction in Count I must be reversed.

II. CONCLUSION

Defendant-appellant Cyrina Hewitt submits that the arguments advanced in her opening brief adequately refutes any argument that the State advanced in its answering brief but which she has not specifically addressed in this reply.

Based on the foregoing arguments and authorities cited, Hewitt respectfully requests that this Honorable Court reverse her conviction.

DATED: Honolulu, Hawaii, February 15, 2017.

Respectfully submitted,
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