CAAP-19-0000491

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI`I, Plaintiff-Appellant, v. TIANA F. M. SAGAPOLUTELE-SILVA also known as Tiana Sagapolutele-Silva or Tiana Sagapolutelesilva, Defendant-Appellee.	CASE NO. 1DTA-18-01227 APPEAL FROM THE NOTICE OF ENTRY OF JUDGMENT AND/OR ORDER AND PLEA/JUDGMENT, entered on June 7, 2019 DISTRICT COURT OF THE FIRST CIRCUIT, HONOLULU DIVISION HONORABLE SUMMER KUPAU-ODO Judge

ANSWERING BRIEF OF DEFENDANT-APPELLEE

APPENDICES "A" - "D"

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SUBJECT INDEX

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

Hawai‘i Constitution

United States Constitution

STATUTES & RULES

Hawai‘i Revised Statutes

CAAP-19-0000491

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I.

STATEMENT OF THE CASE

Defendant-Appellee Tiana M. Sagapolutele-Silva, also known as Tiana Sagapolutele-Silva or Tiana Sagapolutelesilva ("Defendant" herein) was charged by Complaint, filed on April 9, 2018, with: Count 1, Operating A Vehicle Under The Influence Of An Intoxicant, in violation of Hawai`i Revised Statutes ("HRS") §§ 291E-61(a)(1) and/or (b)(1); and Count 2, Excessive Speeding, in violation of HRS §§ 291C-105(a)(1), (c)(1). (Documents for 1DTA-18-01227, Dkt #1).

On October 22, 2018, Sagapolutele filed her: (1) Motion to Suppress Statements (Documents for 1DTA-18-01227, Dkt #10); (2) Motion In Limine To Preclude Evidence Of Any Measurement Purporting To Measure Defendant's Alcohol Content And Any Statements Made By Defendant (Id., Dkt #11); and (3) Supplemental Memorandum To Defendant's Motion To Suppress Statements (Id., Dkt #12).

The hearing on Sagapolutele's pretrial motions was held on June 7, 2019 (Honorable Summer Kupau-Odo).

The District Court granted the motion to suppress the breath test results. (Dockets for CAAP-19-0000491, Dkt #12: 3-6).

On the motion to suppress statements, Honolulu Police Department Officer Franchot Termeteet was called to testify by the State. On May 31, 2018, at around 2:50 a.m., Officer Termeteet was on the School Street onramp to the westbound H-1 freeway enforcing "all traffic laws." (Documents for CAAP-19-0000491, Dkt #12: 8-9). Defendant's vehicle was in "lane number 2"[1] as she passed Officer Termeteet's location. (Id.: 9). Officer Termeteet's attention was drawn to Defendant's vehicle because it was making the sound of "a vehicle that is traveling at a high rate of speed." Defendant's vehicle also appeared to be gaining distance on the vehicles in front of it at a "very fast pace" and appeared to be "traveling at a high rate of speed." (Id.: 10). Officer Termeteet then used his "Department-issued Stalker LIDAR"[2] to measure Defendant's vehicle's speed at 77 miles per hour. The speed limit in the area was 45 miles per hour as evidenced by official signs that Defendant had passed before reaching that location. (Id.: 10-11). As Defendant's speed was 32 miles over the posted speed limit, Officer Termeteet believed that she was committing Excessive Speeding, which was a criminal, petty-misdemeanor offense.[3] (Id.: 16). The speed reading provided Officer Termeteet with probable cause that Defendant had committed Excessive Speeding. (Id.: 17). Officer Termeteet proceeded onto the

[1] Officer Termeteet referred to the from left to right beginning at "lane 1" ("far left lane") to lane 4, which was the far right lane. (Documents for CAAP-19-0000491, Dkt #12: 9).
[2] Defendant did not object to Officer Termeteet's testimony as to the alleged speed of his vehicle for purposes of the motion to suppress. (Documents for CAAP-19-0000491, Dkt #12: 6).
[3] When someone was stopped for excessive speeding they could be arrested or issued a citation if the officer possessed probable cause that they had committed the offense. (Documents for CAAP-19-0000491, Dkt #12: 16).

freeway and caught up to Defendant's vehicle. While following Defendant's vehicle and waiting for a "safe area" to pull it over, Officer Termeteet noticed Defendant's vehicle drift slowly into lane 1 without first signaling. After Defendant's vehicle merged into lane 1 it drifted back into lane 2, again without first signaling. (Id.: 11-12, 17). Officer Termeteet agreed that the drifting consisted of complete lane changes, albeit "[q]uick one[s]." (Id.: 17). Officer Termeteet initiated a "traffic stop" on a median area by activating his blue lights. Defendant's vehicle slowed, merged to the right shoulder lane and came to a complete stop. (Id.: 12). Defendant was not free to leave the scene from that point. (Id.: 18). Officer Termeteet approached the vehicle and saw Defendant sitting in the driver's seat. There was an adult male passenger on the front passenger seat and three females in the "rear cabin" of the vehicle. Officer Termeteet informed Defendant that he had pulled her over for speeding and she acknowledged that she had been speeding.[4] Officer Termeteet asked Defendant for her driver's license and vehicle registration and insurance. Defendant produced a driver's permit for a "CDL" and informed Officer Termeteet that she had a driver's license but did not have it with her at the time. (Id.: 13). Officer Termeteet was standing about three feet away from the window and could smell a "strong odor" of alcohol coming from Defendant's breath and from within the vehicle. (Id.: 18-19). Officer Termeteet could not identify the source of the odor coming from within the vehicle because there were multiple occupants within the vehicle. Defendant's eyes appeared to be "red, watery and glassy." (Id.: 14). At that point, Defendant was the focus of Officer Termeteet's OVUII investigation.[5] (Id.: 19). Officer Termeteet repeated his demand for Defendant's vehicle

[4] Officer Termeteet maintained that he could have cited or arrested Defendant for Excessive Speeding even without her admission. (Documents for CAAP-19-0000491, Dkt #12: 17-18).

[5] Officer Termeteet was asked on re-direct whether he had the option to issue a citation (in lieu of arrest) for excessive speeding, driving without a license and OVUII. According to Officer Termeteet, he could issue a citation and release the driver for all those offenses. (Documents for

registration and insurance and she instead produced her vehicle safety check. Based on the "totality of [his] observations," Officer Termeteet asked Defendant to participate in a Standardized Field Sobriety Test ("SFST"). (Id.: 14). Defendant ostensibly agreed to submit to the SFST. (Id.: 19-20). Based on his training and experience, Officer Termeteet wanted to get verbal consent from the subject to participate in the SFST. (Id.: 19-20). Generally, the SFST could not be administered without the subject's consent and cooperation to participate. (Id.: 20). Officer Termeteet instructed Officer Bobby Ilae to administer the SFST. (Id.: 15).

Officer Bobby Ilae testified that he had administered a SFST to Defendant on May 31, 2018, at 2:50 a.m. (Documents for CAAP-19-0000491, Dkt #12: 23-24). After being informed of the circumstances of the stop by Officer Termeteet, Officer Ilae asked Defendant if she would participate in the SFST. Defendant was not free to leave at that point, while Officer Ilae was "conducting the investigation." (Id.: 39-40). Defendant "indicated that she would" submit to the SFST.[6] (Id.: 25, 30-32). It was Officer Ilae's practice to ask the subject whether they wanted to participate in the SFST but he did not tell them that they were not required to participate. He did not tell the subject that their answers to the MRO questions and their performance on the SFST could be used against them in court. (Id.: 36). Defendant was already standing outside of her car when Officer Ilae arrived and he did not know whether Officer Termeteet had already asked her to submit to the SFST. (Id.: 32). Officer Ilae conducted the SFST on the "trial median on the Moanalua Freeway and Fort Shafter off." (Id.: 25). Officer Ilae asked Defendant a series of questions prior to administering the SFST.[7] The medical rule-out questions ("MRO questions"

CAAP-19-0000491, Dkt #12: 21). It was necessary for Officer Termeteet to have probable cause to issue a citation. (Id.: 22).

[6] Officer Ilae liked to get a verbal consent from the subject before administering the SFST. (Documents for CAAP-19-0000491, Dkt #12: 32).

[7] "Do you have any physical defects or speech impediments, are you taking medication, are you

herein) were designed to gauge whether any impairment that Officer Ilae observed was "medically related" or if there was a "medical emergency." (Id.: 26-27). Officer Ilae always asked the MRO questions before administering the SFST because if there was something medically wrong with the subject, any clues he observed during the SFST might not be validated.[8] (Id.: 32-33). Nevertheless, Officer Ilae would have administered the SFST even if the subject did not answer the MRO questions.[9] (Id.: 27, 34). If a person answered "no" to all the MRO questions, Officer Ilae believed that the subject's performance of the SFST was not influenced by a medical condition. (Id.: 35-36).

On the Horizontal Gaze Nystagmus test, Officer Ilae instructed Defendant to stand with her feet together, heels and toes touching and with her hands at their sides. Defendant was to follow the tip of Officer Ilae's pen with her eyes only. After giving the instructions, Officer Ilae asked whether Defendant understood and if she had any questions. Defendant affirmed that she understood and had no questions. (Documents for CAAP-19-0000491, Dkt #12: 27-28). If the subject answered that they did not understand the instructions, Officer Ilae would not administer the HGN and instead would ask them what needed to be clarified. Officer Ilae would continue clarifying his instructions for the subject until they indicated that they understood. (Id.: 36-37).

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under the care of a doctor or dentist, are you under the care of an eye doctor, are you epileptic or diabetic, artificial or glass eye, are you wearing any contact lenses or corrective lenses, and if you are blind in any eye." (Documents for CAAP-19-0000491, Dkt #12: 26-27).

[8] It was possible that someone who answered "no" to the MRO questions could be untruthful or unaware of a medical condition. (Documents for CAAP-19-0000491, Dkt #12: 41).

[9] When Officer Ilae was asked on cross-examination whether the MRO questions were a "prerequisite to administering the SFST," he responded "No." However, Officer Ilae then stated that he had never administered the SFST without first asking the MRO questions. (Documents for CAAP-19-0000491, Dkt #12: 33). Although Officer Ilae had been trained to ask the MRO questions prior to the SFST, he maintained that he would still administer the SFST if a subject refused to answer the MRO questions but agreed to participate in the SFST, despite the fact that he would not know if they had a medical condition or whether the clues he observed on the SFST were medically related. (Id.: 34-35). Officer Ilae had never administered a SFST where the subject had refused to answer the MRO questions. (Id.: 35).

If a person continued to ask Officer Ilae the same questions over and over again, it might indicate that they were impaired by an intoxicant and he would note that in his report. (Id.: 37-38).

On the Walk-And-Turn test, Officer Ilae instructed Defendant to put her right foot in front of her left foot, touching heel to toe, and to keep her hands at her sides and not move from that position until instructed to do so. Defendant was to take nine heel-to-toe steps in a straight line, make a turn as demonstrated, and then take nine heel-to-toe steps back. (Documents for CAAP-19-0000491, Dkt #12: 28). Officer Ilae demonstrated five heel-to-toe steps, the turn and an additional five heel-to-toe steps. Officer Ilae asked Defendant if she understood the instructions and if she had any questions. Defendant affirmed that she understood and that she did not have any questions. (Id.: 28-29).

On the One-Leg Stand, Officer Ilae instructed Defendant to stand with her feet together, heels and toes touching and with her hands at her sides. Defendant was to raise either foot six inches off the ground, with the bottom of her foot parallel to the ground and her toes pointed forward. Defendant was to keep both legs straight, her hands at her sides and look at her raised foot while counting ("1,001, 1,002, 1,003, 1,004" etc.) until instructed to stop. (Documents for CAAP-19-0000491, Dkt #12: 29-30). Defendant affirmed that she understood the instructions and that she did not have any questions. (Id.: 30).

Based on his training and experience Officer Ilae would not administer any of the SFST tests without the subject clearly indicating that they understood the instructions and that they did not have any questions. (Documents for CAAP-19-0000491, Dkt #12: 38-39). When Officer Ilae asked whether the subject understood his instructions he was also determining their level of comprehension. (Id.: 42).

After Defendant completed the SFST, Officer Ilae administered a Preliminary Alcohol Screening ("PAS"). (Documents for CAAP-19-0000491, Dkt #12: 30). After the PAS, Officer Ilae informed Defendant that she was going to be placed under arrest. Defendant became upset and walked toward the passenger side of her vehicle. Officer Ilae asked her to come back and Defendant followed him to his car. While they were walking to the car Defendant "said that she's not going to lie, she had a few beers but her friends was more impaired than she was." (Id.: 30, 39). Officer Ilae had not asked Defendant any questions to adduce her statement. (Id.: 31).

In argument on the motion, Defendant's counsel ("Defense Counsel") argued that Defendant was not free to leave at the point where Officer Termeteet had probable cause to arrest or cite her for Excessive Speeding. (Documents for CAAP-19-0000491, Dkt #12: 44). Defense Counsel argued that any statements made after that point should be suppressed either directly or as "fruit of the poisonous tree." (Id.: 44-48).

The District Court found that Defendant was in custody when Officer Termeteet measured her speed with his LIDAR and had probable cause to arrest her. (Documents for CAAP-19-0000491, Dkt #12: 63). The court also found that Officer Termeteet and Officer Ilae had subjected Defendant to "interrogation." (Id.: 64-65). [The transcript of the parties' arguments and the court's ruling is attached to the brief as Appendix "A"].

The court issued a Notice Of Entry Of Judgment And/Or Order And Plea/Judgment on June 7, 2019. (Documents for 1DTA-18-01227, Dkt #38).

On July 8, 2019, the State filed its Notice Of Appeal. (Documents for CAAP-19-0000491, Dkt #1).

The court's Amended Notice Of Entry Of Judgment And/Or Order And Plea/Judgment was filed on August 2, 2019. (Documents for 1DTA-18-01227, Dkt #52; a copy is attached to the brief as Appendix "B").

On July 11, 2019, the District Court issued its Findings Of Fact And Conclusions Of Law And Order Granting Defendant's Motion To Suppress Statements. (Documents for 1DTA-18-01227, Dkt #47; a copy is attached to the brief as Appendix "C").

On October 18, 2019, the State filed its Opening Brief. (Documents for CAAP-19-0000491, Dkt #18).

II.

STANDARDS OF REVIEW

Constitutional law: The appellate court answers "questions of law by exercising [its] own independent judgment based on the facts of the case. State v. Jenkins, 93 Hawai`i 87, 100, 997 P.2d 13, 26 (2000) (citation and internal quotation marks omitted). Thus, questions of constitutional law are reviewed under the "right/wrong" standard. Id. Infringement of a constitutional right is presumptively prejudicial and the standard of review is that reversal must be ordered unless the error is proven harmless beyond a reasonable doubt. A constitutional error will not be held harmless if there is a reasonable possibility that the error might have contributed to the conviction. State v. Pokini, 57 Haw, 26, 548 P.2d 1402, cert. denied 97 S.Ct. 392, 429 U.S. 963, 50 L.Ed.2d 332 (1976).

Motion to suppress:

> A [circuit] court's ruling on a motion to suppress evidence is reviewed *de novo* to determine whether the ruling was "right" or "wrong." State v. Edwards, 96 Hawai'i 224, 231, 30 P.3d 238, 245 (2001) (citing State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000)). The proponent of the motion to suppress has the burden of establishing, by a preponderance of the evidence, that the statements or items sought to be excluded were unlawfully secured and that his or her right to

> be free from unreasonable searches or seizures was violated under the fourth amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution. *See* State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d 268, 271 (1999) (citations omitted).

State v. Estabillio, 121 Hawai`i 261, 269, 218 P.3d 749, 757 (2009) (quoting State v. Kaleohano, 99 Hawai`i 370, 375, 56 P.3d 138, 143 (2002)).

In a case like this one, the proponent of a motion to suppress evidence has the burden of establishing that the evidence sought to be excluded was unlawfully secured. State v. Anderson, 84 Hawai'i 462, 467, 935 P.2d 1007, 1012 (1997). The trial court's findings of fact on a motion to suppress evidence are reviewed under the clearly erroneous standard and its conclusions of law de novo. Id.

III.

ARGUMENT

A. THE DISTRICT COURT'S CONCLUSIONS OF LAW 7, 10, 13, AND 16 TO 21 WERE CORRECT.

In its Opening Brief ("OB"; Dockets for CAAP-19-0000491, Dkt #22), the State challenges the District Court's conclusions of law ("COL") 7, 10, 13 and 16 to 21 as wrong because "Sagapolutele-Silva was not in custody or interrogated before the SFST had been administered and she was arrested for OVUII." (Id.: 8). Defendant respectfully disagrees.

Defendant notes that the State did not challenge the District Court's findings of fact ("FOF") as clearly erroneous. The court's FOFs included the following:

> 10. Defendant was not free to leave while she waited for Officer Ilae to arrive.
>
> 11. Prior to Defendant exiting the vehicle, she was not free to leave.
>
> 12. Defendant was the focus of an OVUII investigation.
>
> 13. Officer Termeteet had probable cause to arrest or cite Defendant for the petty misdemeanor offense of Excessive Speeding as soon as he stopped

her vehicle.

….

15. Prior to administering the SFST, Officer Ilae asked Defendant the following questions:
    i. Do you have any physical defects or speech impediments?
    ii. Are you taking any medications?
    iii. Are you under the care of a doctor or dentist for anything?
    iv. Are you under the care of an eye doctor?
    v. Do you have an artificial or glass eye?
    vi. Are you epileptic or diabetic?
    vii. Are you blind in either eye?
    viii. Do you wear corrective lenses?

16. The aforementioned questions are known as the Medical Rule Out ("MRO") questions.

17. There are thousands of medications that could lead to impairment and an OVUII drug investigations [sic].

….

22. Officer Ilae does not tell a person that they do not have to participate in the SFST. He does not tell a suspect that the answers to the [MRO] questions could be used against them in court. He does not tell a suspect that the results of the SFST could be used against them in court.

23. Based on his training, Officer Ilae never administers an SFST without first asking the MRO questions.

….

25. Prior to administering each of three SFSTs, Officer Ilae instructed Defendant on how to perform each test. After instructing Defendant, Officer Ilae asked Defendant if she understood the instructions and whether she had any questions.

26. Officer Ilae would not administer any of the test unless he first got a verbal response that Defendant understood his instructions and that Defendant did not have any questions.

27. If a person says they do not understand the instructions to the SFST and ask the same questions over and over again, it could possibly mean they are mentally impaired by an intoxicant. If a person says they understand the instructions and then they do not perform as instructed, that could also mean they are impaired by an intoxicant.

28. Defendant was never advised of her Miranda rights or her right to remain silent. At no point in time did either Officer Termeteet or Officer Ilae tell Defendant that anything she said could be used against her.

(Documents for 1DTA- 18-01227, Dkt #47: 3-5).

The COLs that the State challenges are as follows:

> 7. At the time that Defendant was sitting in her vehicle, prior to the administration of the SFST, she was not free to leave, she wass the focus of an OVUII investigation and officers had probable cause to arrest [her] for at least Excessive Speeding. Officer[s] Termeteet and Ilae did not need the results of the SFST to arrest and/or cite Defendant for Excessive Speeding. Legal custody had attached.
>
> ….
>
> 10. Asking Defendant if she was willing to participate in the SFST constituted custodial interrogation because she was not free to leave, she was the focus of an OVUII investigation and officers had probable cause to arrest her. Asking a person if they would be willing to participate in a SFST is reasonably likely to elicit an incriminating response. For example, refusing to participate in the SFST can be used at trial to show consciousness of guilt pursuant to State v. Ferm, 94 Haw. 17 (2000).
>
> ….
>
> 13. The MRO questions in this case constituted custodial interrogation and were reasonably likely to elicit incriminating responses. By answering "no" to all the MRO questions, the State will likely use the responses to establish that Defendant did not have any physical or medical ailments that could have affected the results of the SFST. Hence, all of the results of the SFST were caused by impairment by an intoxicant.
>
> ….
>
> 16. Officer Ilae's questioning during the SFST as to whether Defendant understood the instructions was reasonably likely to elicit an incriminating response. For example, if Defendant answered "no," it would be a commentary on her mental faculties and ability to understand the instructions. If Defendant answered "yes," and did not perform the test as instructed, her "yes" response could be used against her at trial to show her mental faculties were impaired.
>
> 17. Defendant's agreement to take the SFST is suppressed and all evidence obtained after the agreement is fruit of the poisonous tree.
>
> 18. Defendant's responses to the MRO questions are suppressed and all evidence obtained by HPD after the MRO questions are suppressed as the fruit of the poisonous tree.
>
> 19. Defendant's answer that she understood the instructions during the SFST is suppressed and the SFST is suppressed as the fruit of the poisonous tree.
>
> 20. Defendant's statements while she was still in the vehicle in response to Termeteet's statement as to why she was being stopped is suppressed.

21. Defendant's statements to Officer Ilae after the SFST is suppressed as fruit of the poisonous tree.

(Documents for 1DTA-18-01227, Dkt #47: 7-10). Based on the District Court's FOFs which are not challenged on appeal by the State, the court's COLs 7, 10, 13 and 16 through 21 are correct and the court properly suppressed Defendant's agreement to submit to the SFST, her responses to the MRO questions, all questions after the SFST and MRO (as fruit of the poisonous tree), Defendant's statement to Officer Termeteet after he told her why she was being stopped and Defendant's statement to Officer Ilae that she had a couple of beers.

1. The District Court properly suppressed Defendant's statements as obtained in violation of her constitutional right to remain silent.

In State v. Tsujimura, 140 Hawai`i 299, 400 P.3d 500 (2017), the Hawai`i Supreme Court held that the right to remain silent (i.e. the right against self-incrimination) protected by article I, section 10 of the Hawai`i Constitution attaches prearrest. In Tsujimura, the police officer observed the defendant "straddling the … rightmost lane and the right shoulder" and pulled him over. The officer pulled him over and asked for his driver's license, registration and insurance information. The officer smelled the odor of an alcoholic beverage and observed that Tsujimura was flushed, his speech was slurred, and he had red, watery eyes. The officer asked Tsujimura to participate in the SFST to which he agreed. When asked whether he noticed observed Tsujimura having difficulty exiting his vehicle, the officer stated that he did not see Tsujimura having any difficulty. Prior to performing the SFST, Tsujimura told the officer that he had an old injury to his knee and that he was taking medication for high blood pressure and diabetes. On redirect examination of the officer, the State asked whether Tsujimura had told him that he couldn't get out of the car due to an ACL injury. Over the objection of the defense, the officer responded, "No statements were made." In finding Tsujimura guilty, the court noted that when Tsujimura

"alighted from the car, he did not indicate any difficulty walking." On appeal, the Hawai`i Supreme Court held that the information elicited by the prosecutor from the officer constituted a comment on the defendant's right to remain silent. The supreme court held that "the right to remain silent is a fundamental component of the right against self-incrimination guaranteed by article I, section 10 of the Hawai`i Constitution." The supreme court recognized that the U.S. Supreme Court had not "definitely resolved whether the privilege against compelled self-incrimination attaches before arrest," but reaffirmed that, "[the Hawai`i Supreme Court] is 'the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai`i Constitution, [it is] free to give broader protection under the Hawai`i Constitution than that given by the federal constitution.'" Tsujimura, 140 Hawai`i at 310, 400 P.3d at 511. Hence, the supreme court held that,

> … the privilege against compelled self-incrimination functions to protect "any person" regardless of whether that person has been arrested or accused. It is therefore evident from the language of article I, section 10 that the right to remain silent attaches even before arrest is made.

Id. In that regard, the supreme court held that "the right [to remain silent] clearly attached in this case at least at the point where Tsujimura was detained as a result of the investigatory stop." Id. at 311, 400 P.3d at 512. The supreme court also clarified that the right against self-incrimination attaches "regardless of whether Miranda warnings have been given." Id.

> Establishing that the privilege against compelled self-incrimination attaches to a person even without formal arrest or the institution of criminal proceedings effectuates the purpose underlying the privilege, for it places on the government the onus of producing evidence against individuals that the government intends to punish and correspondingly frees individuals from any obligation to speak. It is also consistent with the fact that "the right to remain silent derives from the Constitution and not from the Miranda warnings themselves." Mainaaupo, 117 Hawai`i at 252, 178 P.3d at 18 (quoting United States v. Velarde-Gomez, 259 F.3d 1023, 1029 (9th Cir. 2001) (en banc)); accord Roberts v. United States, 445 U.S. 552, 560, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980), and that, therefore, the

> privilege against self-incrimination exists even without the articulation of Miranda warnings.

Id. at 311, 400 P.3d at 512. While the specific issue presented in Tsujimura was the propriety of the prosecutor's comment on the right to remain silent, the underlying basis for its holding was the supreme court's conclusion that the right to remain silent under Article I, Section 10, attaches prearrest. The supreme court further clarified that the right to remain silent derives from the constitution and "exists even without the articulation of Miranda warnings."

In FOF #28, which was not challenged by the State, the District Court found that, "Defendant was never advised of her … right to remain silent." Defendant was seized at the moment that Officer Termeteet stopped her for the excessive speeding charge; Officer Termeteet testified that Defendant was not free from the point where he pulled her over on the median area after measuring her speed with his LIDAR. In FOF #13, which was not challenged by the State, the court found that "Officer Termeteet had probable cause to arrest or cite Defendant for the petty misdemeanor offense of Excessive Speeding as soon as he stopped her vehicle." Obviously, Defendant was seized at this point, even under the Excessive Speeding charge, while Officer Termeteet determined whether to issue a citation or arrest her. At that point, Defendant was detained, "h[er] right to remain silent was invoked, and this right continued during h[er] detention." Tsujimura, 140 Hawai`i at 311, 400 P.3d at 512. In Tsujimura, the Hawai`i Supreme Court specified that the right to remain silent does not derive from the Miranda warnings and that "the privilege against self-incrimination exists even without the articulation of Miranda warnings." Tsujimura, 140 Hawai`i at 311, 400 P.3d at 512. It was not disputed that Defendant was never advised of her right to remain silent and never waived this right. Pursuant to Tsujimura, if Defendant had not said anything at that point, her silence could not be used against her. Therefore, it stands to reason that Defendant's verbal statements and non-verbal

communicative responses (i.e. her physical performance on the SFST) which were obtained without a waiver of her right to remain silent cannot be used against her as well.

Accordingly, the District Court's properly granted Defendant's motion to suppress based on the violation of her right to remain silent pursuant to Tsujimura.

2. The District Court also properly suppressed Defendant's responses to the officers' interrogation as she was not first advised of and waived her rights as articulated in the Miranda warnings.

The focus of the District Court's order suppressing Defendant's "statements" (both verbal and non-verbal communicative responses) was that they were the product of "custodial interrogation" and she was never advised of and waived her Miranda rights. The court further suppressed subsequent evidence/statements as the fruit of the poisonous tree of the preceding illegalities.

An individual's right against self-incrimination is protected by the fifth amendment to the U.S. Constitution and article I, section 10 of the Hawai`i Constitution. In order to protect the privilege against self-incrimination, Article I, Section 10 "requires that Miranda warnings be given to an accused in order for statements obtained during custodial interrogation to be admissible at trial."[10] State v. Joseph, 109 Hawai'i 482, 493-94, 128 P.3d 795, 806-07 (2006). "To be thus informed 'maintains the value of protecting the accused's privilege to freely choose whether or not to incriminate himself or herself,' because 'to convict a person on the basis of a statement procured in violation of his or her constitutional rights is intolerable.'" State v. Kazanas, 138 Hawai`i 23, 34, 375 P.3d 1261, 1272 (2016) (*quoting* State v. Ketchum, 97

[10] "A critical safeguard is the Miranda warning: an accused must be 'warned that he or she had a right to remain silent, that anything said could be used against him or her, that he or she had the right to the presence of an attorney, and that if he or she could not afford an attorney one would be appointed for him or her.'" Ketchum, 97 Hawai`i at 116, 34 P.3d at 1015 (brackets and citation omitted).

Hawai`i 107, 116-17, 34 P.3d 1006, 1015-16 (2001) (*citing* State v. Santiago, 53 Haw. 254, 267, 492 P.2d 657, 665 (1971) (brackets and ellipsis omitted)). The two triggers for the Miranda requirements are "custody" and "interrogation."

> Pursuant to article I, section 10 of the Hawai'i Constitution, a statement made before the defendant is apprised of his or her Miranda rights is not constitutionally elicited if it is established that the "statement was the result of (1) 'interrogation' that occurred while he or she was (2) 'in custody.'" State v. Kazanas, 138 Hawai'i 23, 35, 375 P.3d 1261, 1273 (2016) (quoting Ketchum, 97 Hawai'i at 118, 34 P.3d at 1017).

State v. Trinque, 140 Hawai`i 269, 277, 400 P.3d 470, 478 (2017).

Under Hawai`i law, the determination of whether an individual is in "custody" for purposes of Miranda involves an objective determination of the "totality of the circumstances."

> Since defendant was "interrogated" within the meaning of Miranda, the determinative issue is whether defendant was in custody or otherwise deprived of his freedom of action in any significant way. This determination is to be made by objectively appraising the totality of the circumstances. State v. Sugimoto, 62 Haw. 259, 265, 614 P.2d 386, 391 (1980); State v. Patterson, *supra* at 361, 581 P.2d at 755. 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. State v. Sugimoto, *supra* at 265, 614 P.2d at 391; State v. Patterson, supra at 361, 581 P.2d at 755. 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 him prior to questioning. While focus of the investigation upon the defendant, standing alone, will not trigger the application of the Miranda rule, it is an important factor in determining whether the defendant was subjected to custodial interrogation. State v. Patterson, *supra* at 361, 581 P.2d at 755; State v. Kalai, *supra* at 369, 537 P.2d at 11. Probable cause to arrest is also not determinative, but it may play a significant role in the application of the Miranda rule. State v. Patterson, *supra* at 361, 581 P.2d at 755; People v. Diego, 121 Cal. App.3d 777, 175 Cal. Rptr. 553, 555-56 (1981).

State v. Melemai, 64 Haw. 479, 481, 643 P.2d 541, 544 (1982). *Accord* Kazanas, *supra*.

The Hawai`i Supreme Court has defined "interrogation" for purposes of Article I, Section 10, as follows:

> As previously explained by this court, "interrogation" encompasses "not only . . . express questioning, but also . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." State v. Joseph, 109 Hawai'i 482, 495, 128 P.3d 795, 808 (2006) (quoting State v. Jenkins, 1 Haw. App. 430, 437-38, 620 P.2d 263, 269 (1980)).
>
> > The latter portion of the definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.
>
> Id.; accord Kazanas, 138 Hawai'i at 39, 375 P.3d at 1277.
>
> Thus, "interrogation" is "any practice reasonably likely to invoke an incriminating response without regard to objective evidence of the intent of the police." Joseph, 109 Hawai'i at 495, 128 P.3d at 808 (emphasis added). "An incriminating response' refers to both inculpatory and exculpatory responses." Id. (citing State v. Wallace, 105 Hawai'i 131, 137, 94 P.3d 1275, 1281 (2004)).
>
> There are several important considerations in this court's definition: "interrogation" under Miranda refers to (1) any words, actions, or practice on the part of the police, not only express questioning, (2) other than those normally attendant to arrest and custody, and (3) that the police should know is reasonably likely to invoke an incriminating response.

Trinque, 140 Hawai`i at 277, 400 P.3d at 478.

The doctrine of the "fruit of the poisonous tree" is applicable, and any illegal custodial interrogation requires suppression of subsequent statements, State v. Medeiros, 4 Haw. App. 248, 665 P.2d 181 (1983),[11] as well as physical evidence recovered in subsequent searches, State v. Moore, 66 Haw. 202, 659 P.2d 70 (1983), State v. Temple, 65 Haw. 261, 650 P.2d 1358 (1982), or seizures, State v. Joao, 56 Haw. 216, 533 P.2d 270 (1975), State v. Bonds, 59 Haw. 130, 577 P.2d

[11] "[T]he prosecution has the burden of proving that the second confession resulted from an intervening act of free will independent of any element of coerciveness due to the prior illegality." State v. Amorin, 61 Haw. 356, 362 n.6, 604 P.2d 45, 49 n.6 (1979).

781 (1978). The "ultimate question" posed by the doctrine of the "fruit of the poisonous tree" is as follows: "Disregarding the prior illegality, would the police have nevertheless discovered the evidence?" State v. Poaipuni, 98 Hawai`i 387, 393, 49 P.3d 353, 359 (2002).

a. The District Court properly concluded that Defendant was in "custody" from the point where Officer Termeteet pulled her over for Excessive Speeding.

In COL #7, the District Court properly found that, based on the totality of the circumstances, Defendant was in "custody" at the point where she was "sitting in her vehicle, prior to the administration of the SFST [where] she was the focus of an OVUII investigation and officers had probable cause to arrest [her] for at least Excessive Speeding." Indeed, the State did not challenge FOFs 10 through 12 in which the court found that Defendant was not free to leave while she waited for Officer Ilae to arrive or prior to her exiting her vehicle and that she was the "focus of an OVUII investigation."

To reiterate, in Tsujimura, the Hawai`i Supreme Court held that the defendant had been "detained as a result of the investigatory stop" for purposes of Article I, Section 10 when the officer had pulled him over after seeing him crossing over into the shoulder lane several times.

> Given that the right to remain silent attaches prearrest pursuant to article I, section 10, we hold that the right clearly attached in this case at least at the point when Tsujimura was detained as a result of the investigatory stop. … Thus, upon Tsujimura's seizure, his right to remain silent was invoked, and this right continued during his detention.

Id. (*citing* State v. Eleneki, 106 Hawai`i 177, 180, 102 P.3d 1075, 1078 (2004) ("It is axiomatic that 'stopping an automobile and detaining its occupants constitutes a "seizure" within the meaning of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Hawai`i Constitution, even though the purpose of the stop is limited and the resulting detention quite brief.'" (quoting State v. Powell, 61 Haw. 316, 320, 603 P.2d 143, 147 (1979))).

Both officers confirmed that Defendant was not free to leave prior to the administration of the SFST. After Officer Termeteet measured Defendant's speed as constituting Excessive Speeding, he pulled her over and she was not free to leave until he decided to either issue a citation or arrest her. Officer Termeteet also had taken possession of Defendant's CDL permit and vehicle documents at that point, had informed her that he believed she had committed the offense of Excessive Speeding and had observed indicia of alcohol consumption which led him to begin an OVUII investigation. After being apprised by Officer Termeteet of his observations, Officer Ilae also confirmed that Defendant was not free to leave prior to the SFST as he was conducting his own OVUII investigation. Hence, under the totality of the circumstances, the District Court properly concluded that Defendant was in "custody" for purposes of Miranda.

b. Defendant was subjected to "custodial interrogation."

Based on its conclusion that Defendant was in "custody," the District Court properly concluded that she was subjected to "custodial interrogation." As noted *supra*, "interrogation" encompasses "not only . . . express questioning, but also . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Joseph, 109 Hawai'i at 495, 128 P.3d at 808 (quoting Jenkins, 1 Haw. App. at 437-38, 620 P.2d at 269).

Defendant was subjected to "interrogation" where the question as to whether she would submit to the SFST, the MRO questions and the questions whether she understood the instructions on the SFST were likely to evoke both incriminating verbal statements and incriminating non-verbal communicative responses (COL #s 10 through 16). Officer Ilae admitted that he did not tell subjects that they did not have to participate in the SFST or that their answers to MRO questions and their performance on the SFST could be used against them in

court. Officer Ilae further confirmed that the MRO questions were specifically designed to rule out any other extrinsic causes for deviations on the SFST other than intoxication. The assumption from "no" answers to the MRO questions is that any deviations in performance on the SFST is solely caused by intoxication. In addition, if Defendant had responded that she was using one of the "thousands of medications that could led to impairment and an OVUII drug investigation[]," her response could incriminate her on that basis. In the same vein, Defendant's responses that she understood Officer Ilae's instructions on the SFST and that she had no questions were meant to eliminate any lack of understanding of how to perform the tests as a cause for Defendant's alleged discrepancies on the SFST. Additionally, if Defendant had responded that he did not understand Officer Ilae's instructions, that could have been cited as evidence that she was unable to comprehend the instructions due to impairment. Even if Officer Ilae followed his supposed practice of clarifying his instructions until the subject indicated that she understood, Defendant's responses that she understood the instructions and that she did not have any questions, would ostensibly confirm that any discrepancies in performance of the test were evidence of intoxication/impairment, rather than a misunderstanding of how the test was to be performed. Finally, Defendant's actual performance on the SFST, which was responsive to Officer Ilae's instructions, would be cited as evidence of intoxication/impairment if her performance did not conform to Officer Ilae's instructions. Accordingly, the District Court properly held that Defendant was subjected to "interrogation" where the question as to whether she would submit to the SFST, the MRO questions and the questions whether she understood the instructions on the SFST were potentially incriminating and therefore constituted "interrogation."

c. The evidence obtained after Defendant's agreement to submit to the SFST was also properly suppressed as the fruit of the poisonous tree.

The District Court also properly suppressed all evidence obtained after Defendant's agreement to submit to the SFST and/or after the MRO questions and/or after the instructions on the SFST, as the fruit of the poisonous tree of the preceding illegality (COLs #17 through 21). As Defendant was not advised of her right to remain silent and/or advised of her Miranda rights and waived those rights all evidence and statements which followed and were derived from that illegalities should have been suppressed as the fruit of those preceding illegalities. Poaipuni, 98 Hawai`i at 393, 49 P.3d at 359. Accordingly, the court properly concluded in COLs 17 through 21 that the evidence and statements that followed the illegally obtained statements/responses were suppressed as the "fruit of the poisonous tree."

IV.

RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

See Appendix "D".

V.

CONCLUSION

Based on the foregoing arguments and authorities cited, Defendant-Appellee Tiana Sagapolutele-Silva respectfully requests that this Honorable Court affirm: (1) the Notice Of Entry Of Judgment And/Or Order And Plea/Judgment, entered on June 7, 2019; (2) the Findings Of Fact And Conclusions Of Law And Order Granting Defendant's Motion To Suppress Statements, entered on July 11, 2019; and (3) the Amended Notice Of Entry Of Judgment And/Or Order And Plea/Judgment, entered on August 2, 2019.

DATED: Honolulu, Hawai'i, November 27, 2019.

Respectfully submitted,

ALEN M. KANESHIRO
Attorney at Law

BY: /s/ Alen M. Kaneshiro
ALEN M. KANESHIRO

Attorney for Defendant-Appellee

STATEMENT OF RELATED CASES

Defendant-Appellee is unaware of any related cases pending before the Hawai`i appellate courts.

APPENDIX “A”

(Instant case was recessed at 3:07 PM and another case addressed.)

(Instant case recalled at 3:09 PM.)

THE COURT: Okay. We're back on the record for the move-on, right, case 1, 1:45.

MR. KANESHIRO: Yeah, thank you.

Your Honor, we would argue that at the point in time even before Miss Sagapolutele-Silva was stopped, Officer Termeteet had probable cause to cite or arrest her for excessive speeding when he pulled her over, approached her window, she was not free to leave.

He pretty immediately, or very shortly after reaching the vehicle, smelled the odor of alcohol, the aberrations in her eyes which led him to make her the focus of an OVUII investigation. He asked her if she would be willing to participate in a standardized field sobriety test. And that consent, we would argue -- well, I guess we should get to the first statement that he told her about the speeding and she responded with an admission. We would argue that that's a custodial interrogation questioning or its functional equivalent.

He asked her if she would be willing to participate in a standardized field sobriety test. Under *State versus Ferm* if a person refuses to participate in a standardized field sobriety test, it can be used at trial

and as consciousness of guilt and so that question is reasonably likely to elicit an incriminating response.

With respect to -- oh, I'm sorry. And without the consent Officer Termeteet stated that he cannot administer a standardized field sobriety test without that verbal consent, so if you suppress the consent then the standardized field sobriety test is fruit of the poisonous tree.

The medical rule-out questions, likewise, they are reasonably likely to elicit incriminating responses. Regardless of what the purpose of the test is, regardless of whether it is HPD protocol to ask these questions, if a person answers no to all the medical rule-out questions, as Miss Sagapolutele-Silva did in this case, you can be sure that the State will elicit that testimony in trial and argue that there was nothing physically wrong with her and so what you see on the standardized field sobriety test is likely caused by an intoxicant as opposed to a medical condition.

Officer Ilae testified, you know, that's pretty much what those questions are for is that it rules out any medical issues that he may observe on the standardized -- on the results of the standardized field sobriety test. If a person answers yes to any of these questions, then that can be used against them as well. We

heard Officer Ilae testify that there are thousands of medical -- medications, most of them controlled substances, that can lead to OVUII drug investigations. And he has never, and it is I guess HPD policy and procedure, not to administer the SFST without first asking the medical rule-out questions.

So if you suppress the medical rule-out questions, then the field sobriety tests themselves would be fruit of the poisonous tree.

And this I think is probably the most important is if you're asking -- the standard for an OVUII since in this case there is no breath measurement, is whether a person's normal mental faculties are impaired or their ability to care for themselves and guard against casualty are diminished. If you're asking a person whether they have the mental faculties to understand instructions, that's really going to the heart of what OVUII is.

If a person says no, I don't understand, then that might tell an officer that the person is mentally impaired by intoxicants. If they ask the same questions over and over or if the instructions need to be explained over and over, and the person just says no, I don't understand, that could be a sign of mental impairment. If a person answers yes, they do understand, and then they don't perform the test as instructed, that is also,

likewise, a sign of mental impairment that is going to be used against them.

No matter how they answer this question, it's incriminating whether they say yes or whether they say no. And Officer Ilae made very clear that he is not authorized to administer the HGN, walk-and-turn, and one-leg stand test unless a person's first answer is -- until a person answers yes, I understand, no, I don't have any questions. And so the field sobriety test individually which follow those questions would be fruit of the poisonous tree.

And so we are asking the Court to suppress the statement that she admitted she was speeding, we're asking the Court to suppress the consent both to Officer Termeteet and Officer Ilae to participate in the field sobriety test, the medical rule-out questions, the answers to the question, do you understand, the instructions, do you have any questions, and the field sobriety test as fruit of the poisonous tree of all of those things.

The statement or admission that she was drinking would, likewise, be fruit of the poisonous tree even though it was a -- based on Officer Ilae's testimony, I'll concede that it probably wasn't a response to interrogation but it is fruit of the poisonous tree.

Thank you.

THE COURT: Okay. Okay. So one, two, three,

four, five different statements.

MR. KANESHIRO: Verbal statements.

THE COURT: Verbal statements. And then saying performance on the field sobriety test?

MR. KANESHIRO: Is fruit.

THE COURT: Okay. Mr. Hugo? Oh, wait, I do have a question. I forgot, sorry, Mr. Hugo.

MR. HUGO: That's fine, Your Honor.

THE COURT: The question is, if I find there's custody when Officer Termeteet pulls the defendant over for excessive speeding and informs the defendant of the reason, what is your suggestion, like practically, I want to hear what your thoughts are, what is an officer supposed to do when they have enough for probable cause and they say that they're not going to let the defendant go and their investigation is focused and they have enough to arrest? Are they supposed to right away -- I mean, at what point do they give the warning?

MR. KANESHIRO: Well, I guess it would only -- well, I guess it would only arise in cases of excessive speeding because in a regular speeding case, there wouldn't -- there wouldn't be probable cause to arrest the person.

THE COURT: Okay.

MR. KANESHIRO: So -- because it's noncriminal, it's a civil traffic matter. And so, you

know, for an excessive speeding case, I guess an officer technically doesn't have to even tell them why they're being stopped. An officer can ask them for license, registration. And I've been pulled over before and I've had officers ask for my information --

THE COURT: Without even telling you?

MR. KANESHIRO: -- and come back with a citation. Or say, you know, that you have every right not to talk to me or say anything to me, this is why I'm stopping you.

THE COURT: Okay. So right at the get-go they say anything you say --

MR. KANESHIRO: Yeah.

THE COURT: -- will be held against you?

MR. KANESHIRO: Or license, registration, insurance, and then say, you know, okay, look, you don't have to make any statements to me, anything you say can be used against you, but I'm just informing you that I'm stopping you for this, for excessive speeding, I measured your speed at whatever. And then if at that point, the person chooses to say something, an admission, then they've been warned.

THE COURT: Okay. Okay. Mr. Hugo?

MR. HUGO: The ICA came out with a summary disposition order this week, and I do think that it's a

little bit fair to cite this case because Mr. Kaneshiro was counsel on it. This is the case *State versus Purez*, it's the one that arose I believe out of the Kaneohe district.

MR. KANESHIRO: Yeah.

MR. HUGO: And in this case, at least according to the ICA's rendition of the case, the defendant was pulled over and admitted that she was -- that her license had been revoked, which would mean, at least at that time that there would have been probable cause for, under 286-132, she was driving while her license was revoked and she wasn't able to produce a license.

So if the ICA had strictly applied the ruling that as soon as probable cause attaches, the person is in custody, then in *Purez* they would have clearly found custody. Instead, the way that the court analyzed it is they said we're going to look at an objective appraisal of the totality of circumstances when it comes to a traffic stop. And they looked at the fact that it was conducted in a public area, that the officers weren't using coercion and that it was proceeding in a generally regular manner. And in that case they said there wasn't any custody in the first place.

So I think the State could make the argument that the defendant, even though the officers had probable cause to issue the citation for excessive speeding, under

that sort of analysis even then the defendant wouldn't be in custody.

But assuming for the sake of argument that the defendant was in custody, the State would argue that the defendant wasn't interrogated, that the standardized field sobriety test is, again, and *Purez* cites to why it's still a good authority, that the standardized field sobriety test is seeking real physical evidence as opposed to testimonial communications.

But even if, assuming for the sake of argument, that the medical rule-out questions, which I think have the strongest argument for potentially eliciting incriminating information, the example of using a controlled substance might be that one, the State would argue in that case that even if the medical rule-out questions constituted interrogation, the standardized field sobriety test under the circumstances that Officer Ilae testified to would not be fruit of the poisonous tree.

And it wouldn't be fruit of the poisonous tree for two reasons. First of all, because Officer Ilae testified that it is at least -- that at least he would continue to administer the standardized field sobriety test, if someone refused the -- to answer the medical rule-out questions but nevertheless consented to the standardized field sobriety test.

But also that the -- Mr. Kaneshiro's questions about whether or not you can proceed with the standardized field sobriety test in the absence of the medical rule-out information, as he pointed out, that goes to the validity of the results that are being observed. It is possible that someone could not know, for instance, that they have a medical condition and that their -- that medical condition is affecting their performance.

In other words, what I'm arguing is that, for the fruit of the poisonous tree, there needs to be two things. First of all, the fruit needs to have a sort of but-for relationship. And, second of all, it has to be a product of exploitation of the constitutional violation.

And here, the standardized field sobriety test results themselves are not based on an exploitation of the medical rule-out questions because, again, there is -- there is a possibility that what the -- what the person is reporting on those medical rule-out questions does not necessarily reflect what the real physical evidence might be. And there could be cases where, for example, someone answers that they're not diabetic, they're taken into custody, at the police station they have a medical event, they're taken to the hospital and in that case, you know, they find out that there's diabetes.

So given that there is, I think, not a strict

causal relationship and not a strict exploitation relationship between the medical rule-out questions and the real physical evidence that's been produced from the standardized field sobriety test results, I don't think that the standardized field sobriety test results are fruit of that tree, even assuming that the tree is poisoned.

The other two potential sources of the poisonous tree would be asking for the person's consent which, again, under *State versus Ferm*, an officer can compel the standardized field sobriety test. And so the consent is not -- is not necessary to elicit those results. The reason why -- the reason why officers ask for consent probably just has to do with wanting to make sure that these are voluntary and peaceable resolutions. And I think Justice Nakayama in her dissent to *Wilson* talks about the reasons for implied consent on similar sort of grounds.

So I don't think that consent here, given that the officers, under *State versus Ferm*, don't actually need consent in order to lawfully order someone to perform the standardized field sobriety test, that it's compared to ordering someone to assume a particular stance or ordering someone to be fingerprinted, I don't think that has that but-for relationship. And I don't think that even if you assume that that tree is poisoned, that the standardized field sobriety test is the fruit of it.

The last potential poisonous tree would be the argument asking someone if they understand and their inability to understand, I guess, producing -- producing an incriminating response. But that would be true of any statement. That would even be true of asking someone to -- asking whether or not they understand that they have a right to remain silent, if a person repeatedly said I don't understand what you mean. I mean, under that sort of analysis any statement, including the *Miranda* warnings, would be likely to elicit an incriminating response. And I don't -- I think that seems to be an absurd result.

I think Your Honor asked a good question about what officers are expected to do. First of all, I think our case law makes clear that officers are not expected -- it might be a better system, I don't know, but officers are not expected to immediately issue *Miranda* warnings upon traffic stops.

But, second of all, I think there's a real problem with the validity of any sort of *Miranda* warning that you're giving to someone who you have a strong reason to believe is intoxicated. If you are giving a warning to -- a warning of their constitutional rights, a person should be able to understand those.

And I think that that, you know, I think the next argument would be if a person, if you reasonably

believe that this person might be impaired because of alcohol, you're giving them a warning about their constitutional rights, is that really a valid warning given that person's state of mind? So I think that that doesn't -- that doesn't eliminate the sort of problems that would crop up.

But I think that at least under the circumstances here, there's a good argument that the defendant was not in custody although she was seized. There's also a good argument that the defendant was not interrogated. But even assuming that she was interrogated, the specific interrogations that defense brings do not produce the standardized field sobriety test results as a poisonous fruit.

THE COURT: Okay. So couple questions. The first about -- so Mr. Kaneshiro made arguments about with respect to the instructions, they're asking if the defendant understood the instructions and then -- and then if she had any questions. Okay. He argues that that goes to the heart of (a)(1) charge, right, the element of mental impairment.

MR. KANESHIRO: Correct.

THE COURT: So I think the argument is it's incriminating, right, or likely to elicit incriminating response. What is your response to that?

MR. HUGO: My response is that somebody's confusion, the confusion is what's incriminating here, someone's confusion could be produced by any statement. So if someone is making a statement and their response to it is confusion, then, yes, that could produce an incriminating response. But I don't think it -- the test is also is it objectively likely to produce an incriminating response.

THE COURT: Okay. And then, let's see, the -- so asking someone or in this case asking the defendant to participate in the field sobriety test, the -- how does that not elicit an incriminating -- I mean, do you think that it's not reasonable -- reasonably likely to elicit an incriminating response?

MR. HUGO: Well, so at least under *Ferm* they said that it's -- it's not. Even though *Ferm* is the same case that says that you can construe the person's refusal, they said it just plain doesn't implicate both *Miranda* as well as Article I, Section 10. I think in this case it is, even if we assume for the sake of argument, that asking for consent which could be reasonably -- which would be reasonably likely to elicit a refusal --

MR. KANESHIRO: Which could be incriminating.

THE COURT: Which could be used, I mean, that's what Mr. Kaneshiro argues; right?

MR. HUGO: Right.

THE COURT: It could be used against a defendant.

MR. HUGO: So even if we see that's custodial interrogation, State's argument would be that nevertheless the standardized field sobriety test is not poisonous fruit of that because the officer could -- consent is not a necessary condition to the administration of the standardized field sobriety test.

THE COURT: Okay. So let's -- okay, that's what I wanted to talk about, I'm sorry. So there is a difference between the search and seizure scenario and then the *Miranda* custodial interrogation scenario; right?

MR. HUGO: Right, and *Ferm* looked at both.

THE COURT: Right. But getting back to the search and seizure, I mean, that's where it's clear, I think *Wyatt* says yeah, you do not need consent in the constitutional sense to undertake or to direct a person to perform a field sobriety test. But you still need their agreement. Right? I think in cross-examination Mr. Kaneshiro, with the officer, that you can't force someone's eyes to track, you can't force someone to take certain positions. Right?

MR. HUGO: Well, I mean, the officer could give a lawful order for that person to do so.

THE COURT: Yes. Okay.

MR. HUGO: And --

THE COURT: But here where HPD has a policy that they, officers, must ask for the -- and I don't want to use the word "consent" because it has its own meaning in search and seizure, but their policy is that they have to ask the defendant whether he or she agrees to take the test and that they don't give it unless they get that agreement, how is that then not fruit? How is it that if it's suppressed, right, if I say no, you're supposed to give warnings then you can ask someone to agree to take the test, if that's suppressed how is it not fruit in this case, the test itself?

MR. HUGO: I think the reason why HPD is seeking consent had more to do with not wanting to unnecessarily escalate situations or making people feel like they are -- that they're being coerced or their will is overborne. And there are also -- it's also the case that many people who might be pulled over are not impaired and so maybe you don't want to go to the highest DEFCON level in dealing with them. It might be better to proceed in a more incremental way.

But the State's argument is that the -- the specific word that is used in *Ferm* is "compelled." So the standardized field sobriety test, even if it's compelled,

they said does not implicate a constitutional problem. And so while it is true that, I suppose, the officers couldn't force someone's eyes to track, it is not necessary for them to -- to say would you agree to take the standardized field sobriety test in order for the standardized field sobriety test to be performed. And it's that absence of a causal linkage from the performance of the standardized field sobriety test and the officer's initial request that I think severs the link between a poisonous tree and any fruit.

THE COURT: Okay. Any -- Mr. Kaneshiro, your response?

MR. KANESHIRO: Yes, yeah. I think that -- I understand what Mr. Hugo is saying, but statements don't have to be verbal statements. So the bottom line is you cannot compel, you cannot force somebody to participate in a field sobriety test. If a person chooses not to, that is a nonverbal act, no, I'm not doing it. If a person says, for example, officer says would you be willing to participate in a field sobriety test, if you are, please exit your vehicle, and they don't say a word but they exit their vehicle, that would be nonverbal testimony, yes, that's testimonial acts.

But the bottom line is you cannot get the observations unless you get the person's consent to

participate.

THE COURT: Agreement?

MR. KANESHIRO: Agreement, agreement, agreement, sorry.

I want to point out this *Purez* case. In *State versus Purez*, which just came out, the judgment on appeal hasn't even come out yet, the specific testimony in that case I think it was Sergeant Robert Beatty in Kaneohe, he actually said that, you know, I don't really care what the person tells me, people tell me all kinds of stuff all the time. So the fact that she told me that her license was revoked, I'm not going to take her word for it, I'm going to run checks. And in fact it turned out that he ran checks after everything was done.

So her admission that she was -- her license was revoked did not give Sergeant Beatty probable cause to arrest her at that time for driving on a revoked license or suspended license. Because for him her words mean nothing. That was the record in that case.

In this case, we have a --

THE COURT: Did the ICA actually say that that's -- they agreed with that?

MR. KANESHIRO: They agreed that her, Purez's, admission that her license was -- stating that her license was revoked.

THE COURT: Was not enough?

MR. KANESHIRO: Correct, correct. Because Beatty, Sergeant Beatty said I don't consider a person, what they tell me, to be true. A person -- they tell me stuff all the time, I wasn't drinking, it wasn't me, so I have to do checks on my own. So after he did the CRS checks after the fact, that's when he had probable cause in that particular case. In this particular case, they had the laser reading before they stopped her, so that's the difference.

THE COURT: Okay.

MR. KANESHIRO: You know, and I also appreciate Mr. Hugo's argument about the *Miranda* warnings being read to a person who may possibly be impaired and the perils of that and whether they understand their constitutional rights. I'm not -- and, again, I'm not saying that *Miranda* warnings are the solution because *Miranda* warnings encompass right to an attorney, right to remain silent.

We're talking about the Article I, Section 10 and the right to remain silent. And, you know, if that were to hold true, then forever and always when a person is asked to waive their constitutional rights to be searched at the station, i.e., a breath test or a blood test under *State versus Won,* then none of the breath tests or blood

tests would ever be admissible because at the point in time that they're being asked to waive their right to be searched at the station, the officer still has a belief that this person's normal mental faculties are impaired and they wouldn't be able to understand what they're giving up or what their constitutional rights are.

I think that was a little bit different pre-*McNeely* and pre-*Won* where, you know, the implied consent laws were the controlling law regarding taking a test, but since *McNeely* and *Won*, it's clear that you have a constitutional right not to consent to a test because it is in fact the search.

The whole issue with unknown medical conditions being, you know, a person might answer no, they don't have an unknown medical condition and it still could affect the results of the test. But, I mean, the real test is are you taking any medications. And I think the person knows whether or not they've taken medications, I don't think it's unknown to an individual.

And when Mr. Hugo argues that well, any question where a person -- this is with respect to the instructions on the SFST -- any question that might cause confusion would be incriminating, that's not necessarily true. I mean, we're talking about a question that is asking a person, tell me, what is the state of your mental

faculty, really, like tell me, what is the state of it? Do you understand what I'm saying, yes or no? And if it's no, you're impaired, and if it's yes and you don't perform, then you're impaired.

You know, it's -- it's not a question that, you know, might draw some kind of confusion. It's asking a person to comment directly on their mental state at the time, can you understand what I'm saying? And that's the difference.

So that's it, thank you.

THE COURT: Okay. Thank you, counsel, for the arguments. Then -- we'll take the statements one by one because I find -- I do find that Miss Sagapolutele-Silva was in custody when the officer had a laser reading and had enough probable cause to arrest -- arrest her.

And, you know, it is hard because -- but then so on the one hand it's actually something quite simple, the officers can just, in the excessive speeding context at least, when they approach it's easy just to tell the defendant what her right is, her right to remain silent and to inform the reason for the stop.

And so I find that yes, by approaching and then informing the defendant of the reason, that that was interrogation. And it's also based on the officer -- so the other circumstance is totality. The first Officer

Termeteet, who said that she was not free to go. And certainly as soon as he then observes indicia of alcohol consumption, then his focus was on the defendant for an OVUII investigation.

So even more so now she's in custody and so he should have also warned her of her rights to remain silent before asking her to participate in the field sobriety test. And I find that that's interrogation. Raising that issue with a person telling them that you suspect them of OVUII is reasonably likely to elicit incriminating responses.

And in this case then the defendant's response, the agreement, is suppressed -- the agreement to take the test is suppressed. And because Officer Ilae, his testimony about HPD's policy that they must obtain the agreement or they cannot administer, I find then that that makes what occurred after the actual test itself fruit of the poisonous tree. And that would include also then the defendant's responses to the questions, the medical rule-out questions and the questions of whether she understands the instructions for each of the three tests or whether she has questions for each of the three tests.

And I -- so, again, that's fruit, but also, alternatively, the medical rule-out question, I agree with the defense that asking the person if they've taken

medication is also interrogation likely to elicit an incriminating response because, as the officer testified, there are controlled substances for which the defendant could be arrested for. And then the final statement also fruit. After the defendant is told she's under arrest, and there's no testimony by the officer that he even warned the defendant at that point when placing her under arrest, because of that the -- the utterance, specific utterance oh, utterance I'm not going to lie, I had a few beers but my friends are more impaired, that's also suppressed, again, that's fruit.

MR. KANESHIRO: And the SFST itself?

THE COURT: Yes. And that's because it's fruit of the agreement to take the test.

MR. KANESHIRO: Thank you.

MR. HUGO: And, Your Honor, State --

THE COURT: So the motion is granted then.

MR. HUGO: State would request findings of fact.

THE COURT: Yes, okay. So, Mr. Kaneshiro, you'll prepare.

MR. KANESHIRO: Yes, I will.

THE COURT: And send it to Mr. Hugo --

MR. KANESHIRO: I will.

THE COURT: -- before submitting it to the

APPENDIX “B”

DISTRICT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

DIVISION: HONOLULU DIVISION Friday, 7 June, 2019 13:30 TRAFFIC COURT Room: 10CDUI

NOTICE OF ENTRY OF JUDGMENT AND/OR ORDER AND PLEA/JUDGMENT Print:13:45

Case No.	Date	Name	Citation/Report No.
1DTA-18-01227	06/07/2019	State v. Tiana F M Sagapolutele-Silva @1387658	18122405-001

Iso Case No.	Violation Section	Amended to	Driver's License No.	Veh. Plate No.
1 (Count 1)	HRS 291E-61(a)(1)(3)(b)(1)			

Traffic Infraction: | | Mitigation/Admit | | Contested Hearing/Denied | | Written Statement

Traffic Crime Plea: | | GUILTY | | NO CONTEST | | NOT GUILTY

TRIAL HAD: | | FOUND GUILTY | | FOUND NOT GUILTY

he Court has:
- | | Entered default judgment.
- | | Entered judgment in favor of the State. (See below)
- | | Entered judgment in your favor. (See below)
- | | Vacated the judgment & set for Trial de Novo.

JAIL Hours/Days Months Year Suspended Hours/Days Months Year | | Concurrent | | Consecutive | | Credit

NE/JUDGMENT	Suspended Days Months Year	Suspended Sentence	Days Months Year

LICENSE | | SUSPENDED | | REVOKED Days Months Year | | Absolute | | 30 days absolute: may drive 60 days to and from wor work related purposes and class only | | Concurrent with Administrative Revocation

stitution	CICF	PFA	DE	DUI DE	CPRC	NTF	CTC	SFE	ADF	R20	SGF	Other Fe
	$	$	$	$	$	$	$	$	$	$	$	$

DAGP (Deferred Acceptance of Guilty Plea)	Days
DANCP (Deferred Acceptance of Nolo Contendere)	Months
PROBATION (See attached form)	Year

- | | Demanded Jury Trial
- | | Waived Jury Trial | | Signed & Filed
- | | Waived Presence of Defendant
- | | Waived Reading of the Charge
- ✓ | | Waived Right to Counsel 6/27/19
- ✓ | | Waived Speedy Trial & Rule 48
- | | Retained Own Counsel
- | | Requested Interpreter, Language:

CONDITIONS: Mots hmt had #1 grtd
Def & A (Implied Consent Form) mtd/recd by st
#1 Breath test results excluded from trial
#2 - grtd + FST results - grtd

FISCAL USE: Defense to file Findings of Fact

FILED
DISTRICT COURT OF THE FIRST CIRCUIT
2019 JUN -7 P 4:19
LEGAL DOCUMENTS
R. LEONARD

Deferred to:
- | | Adult Community Service and Restitution Unit _____ Hours
- | | District Court Probation

Driver Education: | | Alcohol Assessment
- | | 10 hours AARP Minimum | | 14 hours AARP Minimum
- | | Driver Improvement Course | | CPRC Course

Need Not Return if Complied		Public Defender (See Back)

- | | Discharged
- | | Dismissed | | With Prejudice | | Without Prejudice
- | | No Further Action Taken
- | | Nolle Prosequi
- | | Stricken

1DTA-18-01227 HB3-1200005208-075
State v. Tiana F M Sagapolut: 2 Pages
State of Hawai'i 06/07/2019 0: 45 PM
Honolulu DC Legal Documents 0HE0

- | | Penal Summons by | | Judicial Services | | TVB
- Bail Forfeiture $ _____ & No Further Action
- Bail Forfeiture $ _____ & Bench Warrant $ _____
- Bond Forfeiture $ _____ & Bench Warrant $ _____
- Bail Forfeiture $ _____ of _____ Set Aside

BAIL SET cont'd | | Custody | | No Bail Set | | Release to Appear | | Aggregate | | Cash Only | | Refund Bail

BAIL/BOND POSTED 1,000.00 1DHP221400 RECEIPT NO./BONDSMAN Sagapolutele-Silva, Tian

OFFICER/BADGE NO.

ATTORNEY

Sagapolutele-Silva, Tiana F M

Def's Signature _____ A _____

Phone No.: _____ (home) _____ (work) Judge/Clerk: S Kupau-Odo /A Pacion

RETURN COURT DATE FOR:	DATE / FLOOR / COURTROOM	TIME
PAYMENT		
SENTENCE		
PROOF OF COMPLIANCE		
DAGP / DANCP		
ARRAIGNMENT PLEA & TRIAL/TRIAL DE NOVO	7/29/19 10C	1:30
REVOKE		
COMMITTED TO CIRCUIT COURT		
TRANSFERRED TO:	PEWA	HONOLULU	KANEOHE	WAHIAWA	WAIPANAE		

prographics (05/12)

COURT COPY

1D-V

DISTRICT COURT OF THE FIRST CIRCUIT — STATE OF HAWAI'I

DIVISION: HONOLULU DIVISION Friday, 7 June, 2019 — 13:30 TRAFFIC COURT Room: 10CDUI

NOTICE OF ENTRY OF JUDGMENT AND/OR ORDER AND PLEA/JUDGMENT

Print:13:45

Case No.	Date	Name	Citation/Report No.
DTA-18-01227	06/07/2019	State v. Tiana F M Sagapolutele-Silva @1387658	18122405-002

Also Case No.	Violation Section	Amended to	Driver's License No.	Veh. Plate No.
1 (Count 2)	HRS 291C-105(a)(1)(c)(1)			

Traffic Infraction: [ ] Mitigation/Admit [ ] Contested Hearing/Denied [ ] Written Statement

Traffic Crime Plea: [ ] GUILTY [ ] NO CONTEST [ ] NOT GUILTY

The Court has:

[ ] Entered default judgment.
[ ] Entered judgment in favor of the State. (See below)
[ ] Entered judgment in your favor. (See below)
[ ] Vacated the judgment & set for Trial de Novo.

TRIAL HAD: [ ] FOUND GUILTY [ ] FOUND NOT GUILTY

JAIL: Hours/Days / Months / Year — Suspended — Hours/Days / Months / Year — [ ] Concurrent [ ] Consecutive [ ] Credit

SENTENCE/JUDGMENT	Days / Months / Year	Suspended Sentence	Days / Months / Year
Suspended			

LICENSE: [ ] SUSPENDED [ ] REVOKED — Days / Months / Year — [ ] Absolute [ ] 30 days absolute; may drive 60 days to and from work work related purposes and class only [ ] Concurrent with Administrative Revocation

Restitution	CICF	PFA	DE	DUI DE	CPRC	NTF	CTC	SFE	ADF	R20	SGF	Other Fe
	$	$	$	$	$	$	$	$	$	$	$	$

[ ] DAGP (Deferred Acceptance of Guilty Plea)
[ ] DANCP (Deferred Acceptance of Nolo Contendere)
[ ] PROBATION (See attached form)
Days / Months / Year

CONDITIONS: _____

[ ] Demanded Jury Trial
[ ] Waived Jury Trial [ ] Signed & Filed
[ ] Waived Presence of Defendant
[ ] Waived Reading of the Charge
[ ] Waived Right to Counsel
[ ] Waived Speedy Trial & Rule 48
[ ] Retained Own Counsel
[ ] Requested Interpreter, Language:

FISCAL USE:

FILED
DISTRICT COURT OF THE FIRST CIRCUIT
2019 JUN -7 P 4:19
CLERK
LEGAL DOCUMENTS
A. LEONARD

Referred to:

[ ] Adult Community Service and Restitution Unit _____ Hours
[ ] District Court Probation
Driver Education: [ ] Alcohol Assessment
[ ] 10 hours AARP Minimum [ ] 14 hours AARP Minimum
[ ] Driver Improvement Course [ ] CPRC Course
[ ] Need Not Return if Complied [ ] Public Defender (See Back)

[ ] Discharged
[ ] Dismissed [ ] With Prejudice [ ] Without Prejudice
[ ] No Further Action Taken
[ ] Nolle Prosequi
[ ] Stricken

[ ] Penal Summons by [ ] Judicial Services [ ] TVB
Bail Forfeiture $ _____ & No Further Action
Bail Forfeiture $ _____ & Bench Warrant $ _____
Bond Forfeiture $ _____ & Bench Warrant $ _____
Bail Forfeiture $ _____ of _____ Set Aside

BAIL [ ] Custody [ ] Aggregate
BET [ ] No Bail Set [ ] Cash Only
TS Cont [ ] Release to Appear [ ] Refund Bail

BAIL/BOND POSTED: ,000.00 1DHP22140 — RECEIPT NO./BONDSMAN: Sagapolutele-Silva, Tiana F M

OFFICER/BADGE/ID#

ATTORNEY

RETURN COURT DATE FOR:	DATE / FLOOR / COURTROOM	TIME
PAYMENT		
SENTENCE		
PROOF OF COMPLIANCE		
DAGP/DANCP		
ARRAIGNMENT PLEA & TRIAL/TRIAL DE NOVO	7/29/19 10C	130
HEARING:		
COMMITTED TO CIRCUIT COURT		
TRANSFERRED TO: [ ] EWA [ ] HONOLULU [ ] KĀNEʻOHE [ ] WAHIAWĀ [ ] WAIʻANAE		

Sagapolutele-Silva, Tiana F M

Def's Signature _____ Address: _____

Phone No.: _____ (home) _____ (work) Judge/Clerk: S Kupau-Odo ~~A Pacion~~

Pographics (05/12) — 10-V-

COURT COPY

DISTRICT COURT OF THE FIRST CIRCUIT AMEND STATE OF HAWAI'I

DIVISION: HONOLULU DIVISION Friday, 7 June, 2019 13:30 TRAFFIC COURT Room: 10CDUI

NOTICE OF ENTRY OF JUDGMENT AND/OR ORDER AND PLEA/JUDGMENT Print:13:45

Case No.	Date	Name	Citation/Report No.
1DTA-18-01227	06/07/2019	State v. Tiana F M Sagapolutele-Silva 01387658	18122405-001

Also Case No.	Violation Section	Amended to	Driver's License No.	Veh. Plate No.
1 (Count 1)	HRS 291E-61(a)(1)(3)(b)(1			

Traffic Infraction: [ ] Mitigation/Admit [ ] Contested Hearing/Denied [ ] Written Statement

Traffic Crime Plea: [ ] GUILTY [ ] NO CONTEST [ ] NOT GUILTY

TRIAL HAD: [ ] FOUND GUILTY [ ] FOUND NOT GUILTY

The Court has:
- [ ] Entered default judgment.
- [ ] Entered judgment in favor of the State. (See below)
- [ ] Entered judgment in your favor. (See below)
- [ ] Vacated the judgment & set for Trial de Novo.

JAIL Hours/Days Months Year Suspended Hours/Days Months Year [ ] Concurrent [ ] Consecutive [ ] Credit

FINE/JUDGMENT	Suspended	Days Months Year	Suspended Sentence	Days Months Year
$				

LICENSE [ ] SUSPENDED [ ] REVOKED Days Months Year [ ] Absolute [ ] 30 days absolute; may drive 60 days to and from work, work related purposes and class only [ ] Concurrent with Administrative Revocation

Restitution	CICF	PFA	DE	DUI DE	CPRC	NTF	CTC	SFF	ADF	R10	SGF	Other Fees
$	$	$	$	$	$	$	$	$	$	$	$	$

[ ] DAGP (Deferred Acceptance of Guilty Plea) Days Months Year
[ ] DANCP (Deferred Acceptance of Nolo Contendere)
[ ] PROBATION (See attached form)

CONDITIONS: Mots-Hmt had #1 gtd
Def's 4th A (Implied Consent Form) mtd/gtd by stip
Breath test results excluded from trial
#2 - Hmtg + FST results - gtd.

[ ] Demanded Jury Trial
[ ] Waived Jury Trial [ ] Signed & Filed
[ ] Waived Presence of Defendant
[ ] Waived Reading of the Charge
[ ] Waived Right to Counsel
[✓] Waived Speedy Trial & Rule 48 6/27/19
[ ] Retained Own Counsel
[ ] Requested Interpreter, Language:

FISCAL USE: Defense to file Findings of Fact

FILED
2019 JUN 19 P 4:19
CLERK DISTRICT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII
LEGAL DOCUMENTS
R. LEONARD

Referred to:
[ ] Adult Community Service and Restitution Unit _____ Hours
[ ] District Court Probation
Driver Education: [ ] Alcohol Assessment
[ ] 10 hours AARP Minimum [ ] 14 hours AARP Minimum
[ ] Driver Improvement Course [ ] CPRC Course
[ ] Need Not Return if Complied [ ] Public Defender (See Back)

[ ] Discharged
[ ] Dismissed [ ] With Prejudice [ ] Without Prejudice
[ ] No Further Action Taken
[ ] Nolle Prosequi
[ ] Stricken

1DTA-18-01227 HN3-1200005309-235
State v. Tiana F M Sagapolut 2 Pages
State of Hawaii 08/26/2019 04:19 PM
Honolulu DC Legal Documents ORMD

[ ] Penal Summons by [ ] Judicial Services [ ] TVH
Bail Forfeiture $ _____ & No Further Action
Bail Forfeiture $ _____ & Bench Warrant $ _____
Bail Forfeiture $ _____ & Bench Warrant $ _____
Bail Forfeiture $ _____ of _____ Set Aside

RETURN COURT DATE FOR:	DATE / FLOOR / COURTROOM	TIME
PAYMENT		
SENTENCE		
PROOF OF COMPLIANCE		
DISCIPLINARY		
ARRAIGNMENT/PLEA & TRIAL/TRIAL DE NOVO	7/29/19 10C	1:30
HEARING		
CONSIDERED BY CIRCUIT COURT		
TRANSFERRED TO: [ ] DCPA [ ] HONOLULU [ ] KANEOHE [ ] WAIANAE [ ] WAHIAWA		

BAIL SET Cont AT $
[ ] Custody [ ] Aggregate
[ ] No Bail Set [ ] Cash Only
[ ] Release to Appear [✓] Refund Bail

BAIL/BOND POSTED 1,000.00 RECEIPT NO./BONDSMAN 1DHP221400 Sagapolutele-Silva, Tian

OFFICER/BADGE NO.: [illegible]

ATTORNEY: [illegible] Akanishi

Sagapolutele-Silva, Tiana F M
Def's Signature _____ Address: _____

Phone No.: _____ (home) _____ (work) Judge/Clerk: S Kupau-Odo /A Pacion

Reprographics 105/17) COURT COPY 10-V-16

DISTRICT COURT OF THE FIRST CIRCUIT — AMEND — STATE OF HAWAI'I

DIVISION: HONOLULU DIVISION Friday, 7 June, 2019 13:30 TRAFFIC COURT Room: 10CDUI

NOTICE OF ENTRY OF JUDGMENT AND/OR ORDER AND PLEA/JUDGMENT Print:13:45

Case No.	Date	Name	Citation/Report No.
1DTA-18-01227	06/07/2019	State v. Tiana F M Sagapolutele-Silva 01387658	18122405-002

Also Case No.	Violation Section	Amended to	Driver's License No.	Veh. Plate No.
1 (Count 2)	HRS 291C-105(a)(1)(c)(1)			

Traffic Infraction: [ ] Mitigation/Admit [ ] Contested Hearing/Denied [ ] Written Statement

Traffic Crime Plea: [ ] GUILTY [ ] NO CONTEST [ ] NOT GUILTY

TRIAL HAD: [ ] FOUND GUILTY [ ] FOUND NOT GUILTY

The Court has:
- [ ] Entered default judgment.
- [ ] Entered judgment in favor of the State. (See below)
- [ ] Entered judgment in your favor. (See below)
- [ ] Vacated the judgment & set for Trial de Novo.

JAIL: Hours/Days / Months / Year — Suspended — Hours/Days / Months / Year — [ ] Concurrent [ ] Consecutive [ ] Credit

FINE/JUDGMENT	Suspended	Days / Months / Year	Suspended Sentence	Days / Months / Year
$				

LICENSE: [ ] SUSPENDED [ ] REVOKED — Days / Months / Year — [ ] Absolute [ ] 30 days absolute; may drive 60 days to and from work; work related purposes and class only [ ] Concurrent with Administrative Revocation

Restitution	CICF	PFA	DE	DUI DE	CPRC	NTF	CTC	SFE	ADF	R20	SGF	Other Fees
$	$	$	$	$	$	$	$	$	$	$	$	$

- [ ] DAGP (Deferred Acceptance of Guilty Plea) — Days / Months / Year
- [ ] DANCP (Deferred Acceptance of Nolo Contendere)
- [ ] PROBATION (See attached form)

CONDITIONS:

- [ ] Demanded Jury Trial
- [ ] Waived Jury Trial [ ] Signed & Filed
- [ ] Waived Presence of Defendant
- [ ] Waived Reading of the Charge
- [ ] Waived Right to Counsel
- [ ] Waived Speedy Trial & Rule 48
- [ ] Retained Own Counsel
- [ ] Requested Interpreter, Language:

FISCAL USE:

FILED
AUG 28 2019
DISTRICT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII
LEGAL DOCUMENTS
BY LEGAL DOCUMENTS
Date:

Referred to:
- [ ] Adult Community Service and Restitution Unit _____ Hours
- [ ] District Court Probation

Driver Education: [ ] Alcohol Assessment
- [ ] 10 hours AARP Minimum [ ] 14 hours AARP Minimum
- [ ] Driver Improvement Course [ ] CPRC Course
- [ ] Need Not Return if Complied [ ] Public Defender (See Back)

- [ ] Discharged
- [ ] Dismissed [ ] With Prejudice [ ] Without Prejudice
- [ ] No Further Action Taken
- [ ] Nolle Prosequi
- [ ] Stricken

- [ ] Penal Summons by [ ] Judicial Services [ ] TVB
- Bail Forfeiture $ _____ & No Further Action
- Bail Forfeiture $ _____ & Bench Warrant $ _____
- Bond Forfeiture $ _____ & Bench Warrant $ _____
- Bail Forfeiture $ _____ of _____ Set Aside

BAIL [ ] Custody [ ] Aggregate
SET [ ] No Bail Set [ ] Cash Only
AT $ cont [ ] Release to Appear [ ] Refund Bail

BAIL/BOND POSTED	RECEIPT NO./BONDSMAN
1,000.00 1DHP221401	Sagapolutele-Silva, Tiana F M

OFFICER/BADGE/ID#

ATTORNEY

RETURN COURT DATE FOR:	DATE/FLOOR/COURTROOM	TIME
[ ] PAYMENT		
[ ] SENTENCE		
[ ] PROOF OF COMPLIANCE		
[ ] DAGP/DANCP		
[ ] ARRAIGNMENT PLEA & TRIAL/TRIAL DE NOVO	7/29/19	10C 130
[ ] HEARING		
[ ] COMMITTED TO CIRCUIT COURT		
[ ] TRANSFERRED TO: [ ] HWA [ ] HONOLULU [ ] KANEOHE [ ] WAIANAE [ ] WAIPAHU		

Sagapolutele-Silva, Tiana F M
Def's Signature _____ Address: _____

Phone No.: _____ (home) _____ (work) Judge/Clerk: S Kupau-Odo ~~H Pacion~~

Reprographics (05/12) COURT COPY 10-V-102

APPENDIX “C”

ALEN M. KANESHIRO 8351
ATTORNEY AT LAW
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HONOLULU, HAWAI'I 96813
TELEPHONE NO. (808) 521-7720
FAX: (808) 566-0347
alen@kaneshirolaw.com

ATTORNEY FOR THE DEFENDANT

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, vs. TIANA SAGAPOLUTELE-SILVA, Defendant.	CASE NO.: 1DTA-18-01227 COUNT I: OPERATING A VEHICLE UNDER THE INFLUENCE OF AN INTOXICANT (HRS § 291E-61(A)(1), (A)(3), (B)(1)) EXCESSIVE SPEEDING (HRS § 291C-105(a)(1), (c)(1) FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS HONORABLE SUMMER KUPAU-ODO, JUDGE

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

The Defendant's Motion to Suppress Statements filed on October 22, 2018, was heard on

June 7, 2019, before the Honorable SUMMER KUPAU-ODO. Present were Deputy Prosecuting Attorney DANIEL HUGO, representing the State of Hawai'i, and ALEN M. KANESHIRO, representing Defendant, who was present. Based on the Defendant's Motion to Suppress Statements, Defendant Supplemental Memorandum in Support of Defendant's Motion to Suppress Statements and the arguments of counsel, and having received evidence @ Defendant's Motion to Suppress Statements is hereby GRANTED. The State did not file an Opposition to Defendant's Motion to Suppress Statements.

When a Finding of Fact can be construed as a Conclusion of Law, it is so intended. When a Conclusion of Law can be construed as a Finding of Fact, it is so intended.

FINDINGS OF FACT

1. On March 31, 2018, at approximately 2:50 a.m., Honolulu Police ("HPD") Department Officer Franchot Termeteet ("Officer Termeteet") was conducting speed enforcement on the H1 Freeway, monitoring westbound traffic from the School Street onramp. Officer Termeteet observed Defendant's vehicle on the H1 Freeway, westbound in the number 2 lane.
2. Officer Termeteet used his HPD issued LIDAR to measure Defendant's speed at 77 miles per hour in a 45 mile per hour zone.[1]
3. Officer Termeteet got onto the H1 Freeway to follow Defendant's vehicle. Officer Termeteet had a clear and continuous view of Defendant's vehicle from the time he measured her speed to the time he pulled Defendant over.
4. Defendant passed at least two 45 mile per hour speed limit signs.
5. While following Defendant's vehicle, Officer Termeteet observed Defendant drift into lane

[1] At the hearing on Defendant's Motion to Suppress Statements, Defendant stipulated to Defendant's speed for purposes of the Motion to Suppress Statements only. Defendant reserved the right to challenge the speed reading at trial.

number 1, completing a lane change without signals and then drift from lane 1 back to lane 2, completing another lane change without signals.

6. Officer Termeteet activated his blue flashing lights and Defendant's vehicle came to a complete stop in the right shoulder lane.

7. Officer Termeteet approached Defendant's driver's side window and noticed the odor of alcohol coming from her breath. Officer Termeteet also noticed the odor of alcohol coming from within the vehicle. There was a male sitting in the front passenger seat and three females in the backseat.

8. Officer Termeteet asked Defendant for her driver's license. Officer Termeteet stated that Defendant could only provide him with CDL drivers permit. When asked for her vehicle registration, Defendant provided her vehicle safety check. Officer Termeteet asked Defendant if she would be willing to participate in a standardized field sobriety test ("SFST"). Defendant verbally consented[1] to participate in the SFST. Defendant exited her vehicle and HPD Officer Bobby Ilae ("Officer Ilae") took over the investigation.

9. When Officer Ilae arrived on scene, Officer Termeteet apprised him of his observations. Officer Ilae approached Defendant's vehicle and began conversing with her. Officer Ilae asked Defendant if she would be willing to participate in an SFST. Defendant verbally consented to participate in the SFST. Officer Ilae testified that as a police officer, he obtains verbal consent prior to administering the SFST. Officer Ilae also stated that he cannot force someone to participate in the SFST, i.e., he needs their consent.

10. Defendant was not free to leave while she waited for Officer Ilae to arrive.

11. Prior to Defendant exiting the vehicle, she was not free to leave.

12. Defendant was the focus of an OVUII investigation.

1/ "Consent" throughout these findings and conclusions carries its colloquial meaning and does not mean legal consent.

13. Officer Termeteet had probable cause to arrest or cite Defendant for the petty misdemeanor offense of Excessive Speeding as soon as she stopped her vehicle.

14. Officer Ilae cannot conduct the SFST unless a person consents to the test.

15. Prior to administering the SFST, Officer Ilae asked Defendant the following questions:

    i. Do you have any physical defects or speech impediments?

    ii. Are you taking any medications?

    iii. Are you under the care of a doctor or dentist for anything?

    iv. Are you under the care of an eye doctor?

    v. Do you have an artificial or glass eye?

    vi. Are you epileptic or diabetic?

    vii. Are you blind in either eye?

    viii. Do you wear corrective lenses?

16. The aforementioned questions are known as the Medical Rule Out ("MRO") questions.

17. There are thousands of medications that could lead to impairment and an OVUII drug investigations.

18. Defendant answered "no" to all of the questions.

19. Officer Ilae testified that if a person did not want to answer the questions he would still administer the SFST, however, based on his training in accordance with HPD and the National Highway Traffic Safety Administration standards, he has to ask the MRO questions first.

20. The MRO questions are to see if impairment is medical related or if there's a medical emergency.

21. The MRO questions can "rule-out" medical causes that might cause a person to perform

poorly on the SFST. If a person answers "no" to all the MRO questions, it eliminates the category of medical conditions as a factor in the results of the SFST. The MRO questions must be asked to administer the SFST safely.

22. Officer Ilae does not tell a person that they do not have to participate in the SFST. He does not tell a suspect that the answers to the medical rule out questions could be used against them in court. He does not tell a suspect that the results of the SFST could be used against them in court.

23. Based on his training, Officer Ilae never administers an SFST without first asking the MRO questions.

24. The SFSTs consist of the Horizontal Gaze Nystagmus Test ("HGN"), Walk and Turn ("WAT"), and One Leg Stand ("OLS") tests.

25. Prior to administering each of three SFSTs, Officer Ilae instructed Defendant on how to perform each test. After instructing Defendant, Officer Ilae asked Defendant if she understood the instructions and whether she had any questions.

26. Officer Ilae would not administer any of the tests unless he first got a verbal response that Defendant understood his instructions and that Defendant did not have any questions.

27. If a person says they do not understand the instructions to the SFST and ask the same questions over and over again, it could possibly mean they are mentally impaired by an intoxicant. If a person says they understand the instructions and then they do not perform as instructed, that could also mean they are impaired by an intoxicant.

28. Defendant was never advised of her Miranda rights or her right to remain silent. At no point in time did either officer Termeteet or Officer Ilae tell Defendant that anything she said could be used against her. (GN)

CONCLUSIONS OF LAW

1. Article I, section 10 of the Hawai'i Constitution provides, in relevant part, that "no person

29. After Officer Ilae told Defendant she was under arrest following the SFSTs, Defendant admitted to drinking beers and that her friends were more impaired. (G)

shall . . . be compelled in any criminal case to be a witness against oneself." Ketchum, 97 Hawai'i at 116, citing State v. Santiago, 53 Haw. 254 (1971).

2. [Article I, section 10] provides "an independent source" from that of the fifth amendment to the United States Constitution for the "protections which the United States Supreme Court enumerated" in Miranda v. Arizona." 53 Haw. at 266, 492 P.2d at 664.

3. The "Miranda rule," is, at core, a constitutionally prescribed rule of evidence that requires the prosecution to lay a sufficient foundation -- i.e., that the requisite warnings were administered and validly waived before the accused gave the statement sought to be adduced at trial -- before it may adduce evidence of a defendant's custodial statements that stem from interrogation during his or her criminal trial. "If these minimal safeguards are not satisfied, then statements made by the accused may not be used either as direct evidence . . . or to impeach the defendant's credibility[.]" Id.

4. There is a two-part test for determining when Miranda warnings are triggered, "the defendant, objecting to the admissibility of his or her statement and, thus, seeking to suppress it, must establish that his or her statement was the result of (1) "interrogation" that occurred while he or she was (2) "in custody.

5. To determine whether "interrogation" is "custodial," [the court] look[s] to the totality of the circumstances, focusing on 'the place and time of the interrogation, the length of the interrogation, the nature of the questions asked, the conduct of the police, and [any] other relevant circumstances.'" Ketchum, at 122 citing Ah Loo, 94 Hawai'i at 210 and Melemai, 64 Haw. at 481. Among the "other relevant circumstances" to be considered are whether the investigation has focused on the suspect and whether the police have probable cause to arrest the suspect.

6. Article I, section 10 of the Hawaii Constitution provides greater protections to an individual. A person's right to remain silent attaches upon seizure. ~~At no point in time did either Officer Termeteet or Officer Ilae tell Defendant that anything she said could be used against her~~. See State v. Tsujimura, 140 Hawai'i 299, 310-11, 400 P.3d 500, 511-12 (2017). @

7. At the time that Defendant was sitting in her vehicle, prior to the administration of the SFST, she was not free to leave, she was the focus of an OVUII investigation and officers had probable cause to arrest ger for at least Excessive Speeding. Officer Termeteet and Ilae did not need the results of the SFST to arrest and/or cite Defendant for Excessive Speeding. Legal custody had attached. @

8. While Defendant had not yet been arrested when she was asked to participate in the SFST, "...an arrest is hardly a "condition precedent" to custodial interrogation, and questioning in a setting as familiar to the defendant as his residence may still be custodial in character," and "The Miranda rule is not confined to the station house setting, and it does not lose its relevancy simply because the interrogation takes place in familiar surroundings. State v. Russo, 67 Haw. 126 (1984).

9. The Hawaii Supreme Court has defined "interrogation" as "express questioning or its functional equivalent." The Court has also stated that "to the extent that, under article I, section 10, the ultimate question regarding "interrogation" is whether the questioning officer knew or reasonably should have known that his or her question was likely to elicit an incriminating response" and that "interrogation consists of any express question -- or, absent an express question, any words or conduct -- that the officer knows or reasonably should know is likely to elicit an incriminating response." State v. Kazanas, 138 Haw. 23, 40 (2016).

10. Asking Defendant if she was willing to participate in the SFST constituted custodial interrogation because she was not free to leave, she was the focus of an OVUII investigation and officers had probable cause to arrest her. Asking a person if they would be willing to participate in a SFST is reasonably likely to elicit an incriminating response, ~~because~~ For example, refusing to participate in the SFST can be used at trial to show consciousness of guilt pursuant to State v. Ferm, 94 Haw. 17 (2000).

11. ~~The SFST could not have been administered to Defendant without her verbal consen~~t.

12. The results of the SFST and the responses to the MRO questions will likely be used against Defendant at trial.

13. The MRO questions in this case constituted custodial interrogation and were reasonably likely to elicit incriminating responses. By answering "no" to all the MRO questions, the State will likely use the responses to establish that Defendant did not have any physical or medical ailments that could have affected the results of the SFST. Hence, all of the results of the SFST were caused by impairment by an intoxicant.

14. The question as to whether a person is taking any medication could lead to thousands of responses that could result in an OVUII drug investigation.

15. In this case, according to Officer Ilae, the SFST would not have been administered without first asking the MRO questions.

16. Officer Ilae's questioning during the SFST as to whether Defendant understood the instructions was reasonably likely to elicit an incriminating response. For example, if Defendant answered "no," it would be a commentary on her mental faculties and ability to understand the instructions. If Defendant answered "yes," and did not perform the test

as instructed, her "yes" response could be used against her at trial to show her mental faculties were impaired.

17. Defendant's ~~consent to~~ agreement to take the SFST is suppressed and all evidence obtained after the ~~consent is~~ agreement is fruit of the poisonous tree.

18. The MRO questions are suppressed and all evidence obtained by HPD after the MRO Defendant's responses to questions are suppressed as fruit of the poisonous tree.

19. Defendant's answer that she understood the instructions during the SFST is suppressed and the SFST is suppressed as fruit of the poisonous tree.

20. Defendant's statements while she was still in the vehicle in response to Termeteet's statement as to why she was being stopped is suppressed.

21. Defendant's statements to Officer Ilae after the SFST is suppressed as fruit of the poisonous tree.

ORDER

IT IS HEREBY ORDERED that the Defendant's Motion to Suppress Statements is GRANTED. Defendant's ~~consent to~~ agreement to take the SFST and her responses to the MRO questions are suppressed and any and all evidence obtained by HPD after Defendant's ~~consented to~~ agreement to take the SFST and the MRO questions is/are suppressed as fruit of the poisonous tree. Further, Defendant's statements ~~to Officer Ilae~~ while she was still in the vehicle in response to Officer Termeteet's statements as to why Defendant was being stopped is also suppressed. Further, Defendant's statement to Officer Ilae after the SFST, "I had a couple beers but I wasn't as bad as my friends," is also suppressed.

DATED: Honolulu, Hawai'i, July 11, 2019.

HONORABLE SUMMER KUPAU-ODO
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Daniel A. Hugo
DANIEL A. HUGO
DEPUTY PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

APPENDIX “D”

Hawai`i Revised Statutes

§ 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.

U.S. Constitution

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.

Hawai`i Constitution

Article I, Section 10, Indictment; Preliminary Hearing; Information; Double Jeopardy; Self-Incrimination.

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 or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide, 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.