

**Electronically Filed  
Intermediate Court of Appeals  
CAAP-19-0000491  
18-OCT-2019**

**NO. CAAP-19-0000491 09:04 AM**

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII,	)	CASE NO. 1DTA-18-01227
	)	
Plaintiff-Appellant,	)	APPEAL FROM THE NOTICE OF
	)	ENTRY OF JUDGMENT AND/OR
vs.	)	ORDER AND PLEA/JUDGMENT, filed
	)	on June 7, 2019
TIANA F.M. SAGAPOLUTELE-SILVA,	)	
	)	DISTRICT COURT OF THE FIRST
Defendant-Appellee.	)	CIRCUIT
	)	HONOLULU DIVISION
	)	
	)	HONORABLE SUMMER KUPAU-ODO
	)	JUDGE

---

**OPENING BRIEF**

**APPENDIX "A"**

and

**CERTIFICATE OF SERVICE**

DWIGHT K. NADAMOTO 2756  
Acting Prosecuting Attorney  
BRIAN R. VINCENT 8002  
Deputy Prosecuting Attorney  
City and County of Honolulu  
1060 Richards Street  
Honolulu, Hawai'i 96813  
Telephone: (808) 768-6579  
Email: [bvincent@honolulu.gov](mailto:bvincent@honolulu.gov)

Attorneys for State of Hawai'i  
Plaintiff-Appellant

## OPENING BRIEF

### I.

#### STATEMENT OF THE CASE

On April 9, 2018, Defendant-Appellee, Tiana F.M. Sagapolutele-Silva (Sagapolutele-Silva) was charged by written Complaint with Operating a Vehicle Under the Influence of an Intoxicant (OVUII) as a first offender within 5 years<sup>1,2</sup>. On October 22, 2018, Sagapolutele-Silva filed a Motion to Suppress Statements<sup>3</sup>, a Motion in Limine to Preclude Evidence of Any Measurement Purporting to Measure Defendant's Alcohol Content and Any Statements Made by Defendant<sup>4</sup> and a Supplemental Memorandum to Defendant's Motion to Suppress Statements<sup>5</sup> seeking to suppress statements made after the traffic stop and the results of the Standard Field Sobriety Test (SFST).

A hearing on the Motion to Suppress Statements was held on June 7, 2019<sup>6</sup>, and in the Findings of Fact and Conclusions of Law and Order Granting

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<sup>1</sup> Hawai'i Revised Statutes (HRS) § 291E-61(a)(1) (Supp. 2018). OVUII as a first offense within 5 years is a petty misdemeanor. HRS § 291E-61(b)(1)(C)(ii).

<sup>2</sup> Dkt. #1 for 1DTA-18-01227 (Dist. Dkt. #1). Sagapolutele-Silva was also charged with the offense of Excessive Speeding as a first offense within 5 years in violation of 291C-105(a)(1) (2007 & Supp. 2018).

<sup>3</sup> Dist. Dkt. #10 at 1-2.

<sup>4</sup> Dist. Dkt. #11 at 24.

<sup>5</sup> Dist. Dkt. #12 at 22-23.

<sup>6</sup> Dkt. #12 for CAAP-19-0000491 (App. Dkt. #12).

Defendant's Motion to Suppress Statements<sup>7</sup> the district court made the following 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.
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 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 to participate in the SFST.

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<sup>7</sup> Dist. Dkt. #47. (attached as Appendix "A")

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.
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.
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.

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.<sup>8</sup>

At the conclusion of the hearing, the district court granted Sagapolutele-Silva's Motion to Suppress Statements and entered its written order on July 11, 2019.<sup>9</sup> The State timely electronically filed its Notice of Appeal of that Order via the Judiciary Electronic Filing and Service System (JEFS) on July 8, 2019.<sup>10</sup>

## II.

### POINTS OF ERROR

1. **The district court erred in Conclusions of Law 7, 10, 13, 16 to 21 and the Order because because Sagapolutele-Silva was not in custody or seized until after she took the SFST and was arrested for OVUII**
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The district court made the following Conclusions of Law:

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 [h]er 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.
- ...
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).

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<sup>8</sup> *Id.* at 3-6 (footnote omitted).

<sup>9</sup> App. Dkt. #12 at 65; Dist. Dkt. #47.

<sup>10</sup> App. Dkt. #1.

...

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 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 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 agreement to take the SFST and the MRO questions is/are suppressed as fruit of the poisonous tree. Further, Defendant’s statements 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.<sup>11</sup>

The State argued against these Conclusions of Law contending that, “even though the officers had probable cause to issue the citation for excessive speeding ... the defendant wouldn’t be in custody.”<sup>12</sup>

### III.

#### STANDARD OF REVIEW

##### A. Motion to suppress

Hawai‘i appellate courts review the circuit court’s ruling on a motion to suppress *de novo* and must look to the entire record on appeal to determine whether the ruling was right or wrong.<sup>13</sup>

### IV.

#### ARGUMENT

##### A. The district court erred in Conclusions of Law 7, 10, 13, 16 to 21 and the Order because because Sagapolutele-Silva was not in custody or seized until after she took the SFST and was arrested for OVUII

The district court suppressed Sagapolutele-Silva’s agreement to take the SFST, Sagapolutele-Silva’s responses to the “medical rule-out” questions, Sagapolutele-Silva’s responses to the SFST instructions, Sagapolutele-Silva’s responses to why she had been stopped, Sagapolutele-Silva’s performance on the SFST and any statements Sagapolutele-Silva made after the SFST based on the

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<sup>11</sup> Dist. Dkt. #47 at 7-11.

<sup>12</sup> App. Dkt. #12 at 50-51.

<sup>13</sup> *State v. Joseph*, 109 Haw. 482, 493, 128 P.3d 795, 806 (2006) (citation and quotation marks omitted).

fact that *Miranda* warnings had not been read to Sagapolutele-Silva immediately when she was stopped.<sup>14</sup> However, *Miranda* warnings were not required, because Sagapolutele-Silva was not in custody or interrogated before the SFST had been administered and she was arrested for OVUII.

Whether interrogation was carried on in a custodial context is dependent on the totality of circumstances surrounding the questioning. The relevant circumstances, we have said, include the time, place and length of the interrogation, the nature of the questions asked, and the conduct of the police at the time of the interrogation. But the ultimate test is whether the questioning was of a nature that would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination.<sup>15</sup>

Here, as in *State v. Wyatt*, Officer Termeteet had reasonable suspicion to stop Sagapolutele-Silva based on the observation that Sagapolutele-Silva was speeding.<sup>16</sup> As in *Wyatt*, Officer Ilae, who conducted the SFST, was not motivated by subterfuge or trickery in asking Sagapolutele-Silva the “medical rule out” questions and in instructing her how to perform the SFST. The “medical rule out” questions are for the purpose of ruling out driving impairment from other sources than alcohol intoxication and to protect the OVUII suspect from potential injury while performing the SFST. There is nothing in the nature of the questions that “was of a nature that would subjugate the individual to the will of his examiner”.

As the Hawai‘i Supreme Court in *Wyatt* noted, the SFST seeks “neither ‘communications’ nor ‘testimony’ from [the suspect]. What [it] sought ... was an

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<sup>14</sup> Dist. Dkt. #47 at 7-11.

<sup>15</sup> *State v. Wyatt*, 67 Haw. 293, 299, 687 P.2d 544, 549 (1984) (citations, quotation marks and brackets omitted).

<sup>16</sup> Findings of Fact 2 to 4, Dist. Dkt. #47 at 2.

exhibition of ‘physical characteristics of coordination’”.<sup>17</sup> The Hawai‘i Supreme Court held that, under the facts in *Wyatt*, there was no custodial interrogation and thus no requirement that Wyatt be Mirandized.<sup>18</sup> Sagapolutele-Silva has made no attempt to distinguish the facts of *Wyatt* from the instant case. Nor is the State aware of any reason why *Wyatt* would be distinguishable. Nor has *Wyatt* been overruled by subsequent case law.

In *State v. Tsujimura*<sup>19</sup>, the Hawai‘i Supreme Court held “the State may not use as substantive proof of guilt a defendant’s prearrest silence that occurs at least as of the time of detention, for doing so would violate the right against compelled self-incrimination under article I, section 10 of the Hawai‘i Constitution.”<sup>20</sup> It is true that *Tsujimura* holds that a suspect has a right to remain silent before arrest. However, nowhere in *Tsujimura*, does it indicate that a suspect has to be informed of that right to remain silent. A suspect only needs to be informed of the right to remain silent, i.e., to be Mirandized, if there is custodial interrogation. With respect to whether there was custodial interrogation, *Wyatt* still controls and requires the reversal of the order to suppress in this case.

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<sup>17</sup> *Wyatt* at 303, 687 P.2d at 551 (citations omitted).

<sup>18</sup> *Id.*; See also *State v. Ferm*, 94 Haw. 17, 29, 7 P.3d 193, 205 (App. 2000) (because defendant’s refusal to take SFST’s was neither testimonial nor compelled, federal and state constitutions were not offended).

<sup>19</sup> 140 Haw. 299, 400 P.3d 500 (2017).

<sup>20</sup> *Id.* at 314, 400 P.3d at 515.

Furthermore, courts in other jurisdictions have addressed this issue and come to the same conclusion as *Wyatt*. In *Pennsylvania v. Bruder*<sup>21</sup>, the United States Supreme Court, in what it referred to as the *Berkemer* rule, held that, “the noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not ‘in custody’ for the purposes of *Miranda*.” In *Ackerman v. State*<sup>22</sup>, the Court of Appeals of Indiana concluded that, “police are not required to advise a person in custody that she may consult with an attorney before administering FST’s.” In *State v. Mosley*<sup>23</sup>, The Court of Appeals of Georgia concluded that, “with respect to a DUI investigation in particular, *Miranda* warnings are not required while an investigating officer conducts preliminary questioning or field sobriety tests.” In *Commonwealth v. Cameron*<sup>24</sup>, the Appeals Court of Massachusetts concluded that, “the temporary detention, questioning, and administering of field sobriety tests did not constitute custodial interrogation”. In *State v. Peele*<sup>25</sup>, the Supreme Court of Carolina concluded that, “The facts in this case show that this traffic stop did not constitute detention sufficient to rise to the

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<sup>21</sup> 488 U.S. 9, 10, 109 S. Ct. 205, 206, 102 L. Ed. 2d 172 (1988) (quotation marks omitted) (citing *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317 (1984) (suspect not taken into custody for purposes of *Miranda* until arrested)).

<sup>22</sup> 774 N.E.2d 970, 981-82 (Ind. Ct. App. 2002).

<sup>23</sup> 321 Ga. App. 236, 238, 739 S.E.2d 106, 108 (Ga. Ct. App. 2013) (footnote and quotation marks omitted).

<sup>24</sup> 44 Mass. App. Ct. 912, 914, 689 N.E.2d 1365, 1368 (Mass. App. Ct. 1998).

<sup>25</sup> 298 S.C. 63, 66, 378 S.E.2d 254, 256 (S.C. 1989) (collecting cases in footnote 2).

level of ‘custodial interrogation.’ The restrictions did not curtail appellant's freedom of action to a degree associated with formal arrest.”

In short, Sagapolutele-Silva has not shown that the evidence admitted at trial with respect to the SFST was obtained in violation of her federal or Hawai‘i constitutional rights or in violation of any statutory right. Because the SFST evidence was admissible, the district court erred in concluding that Sagapolutele-Silva was in custody as soon as Officer Termeteet stopped her and erred in suppressing all statements made by Sagapolutele-Silva and evidence of Sagapolutele-Silva’s performance on the SFST.

V.

**CONCLUSION**

Based on the foregoing argument and authority, the State requests this Court to reverse the district court’s order suppressing evidence and remand this case back for trial on the merits.

Dated at Honolulu, Hawai‘i: October 18, 2019.

Respectfully submitted,

STATE OF HAWAI‘I  
Plaintiff-Appellant

By DWIGHT K. NADAMOTO  
Acting Prosecuting Attorney

By /s/ BRIAN R. VINCENT  
Deputy Prosecuting Attorney  
City and County of Honolulu

ALLEN M. KANESHIRO 8351  
ATTORNEY AT LAW  
841 BISHOP STREET, STE 2201  
HONOLULU, HAWAII 96813  
TELEPHONE NO. (808) 521-7720  
FAX: (808) 566-0347  
alen@kaneshirolaw.com

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ATTORNEY FOR THE DEFENDANT

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

STATE OF HAWAII,

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

Appendix "A"

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, <sup>and having received evidence @</sup> 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.<sup>1</sup>
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

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<sup>1</sup> 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<sup>1</sup> to participate in the SFST. Defendant exited her vehicle and HPD Officer Bobby Ilae ("Officer Ilae") took over the investigation. (en)
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. (en)



13. Officer Termeteet had probable cause to arrest or cite Defendant for the petty misdemeanor offense of Excessive Speeding as soon as ~~she~~ 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 Termetcet or officer Ilae tell Defendant that anything she said could* CONCLUSIONS OF LAW *be used against her.* (9)

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.* (9)

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 Hawaii 299, 310-11, 400 P.3d 900, 511-12 (2017).* (a)
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 her 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.* (a)
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, <sup>For example,</sup> because 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 consent.~~ ②

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.

*In this case, according to officer Ilae,*  
15. The SFST would not have been administered without first asking the MRO questions. ②

16. Officer Ilae’s questioning during the SFST as to whether Defendant understood the instructions was reasonably likely to elicit an incriminating response. <sup>For example, if</sup> 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 ②

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

17. Defendant's <sup>agreement to take</sup> ~~consent~~ to the SFST is suppressed and all evidence obtained after the <sup>agreement is</sup> ~~consent~~ is fruit of the poisonous tree. (C)

18. <sup>Defendant's responses to</sup> The MRO questions are suppressed and all evidence obtained by HPD after the MRO questions are suppressed as fruit of the poisonous tree. (C)

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 Termetee'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~~ <sup>agreement to take</sup> the SFST and ~~her responses to~~ <sup>her responses to</sup> the MRO questions are suppressed and any and all evidence obtained by HPD after Defendant's ~~consent to~~ <sup>agreement to take</sup> 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

V.

**STATEMENT OF RELATED CASES**

The following cases involve the issue of whether “medical rule out” questions and any conduct by an OVUII suspect on the SFST require *Miranda* warnings:

*State v. Inenaga*, CAAP-16-0000388 (Hawai‘i Supreme Court rejected application for certiorari)

*State v. Uchima*, CAAP-17-0000081 (unpublished SDO) (App. Feb. 16, 2018) (Hawai‘i Supreme Court accepted application for certiorari with no oral argument)

*State v. Horvath*, CAAP-17-0000349 (Hawai‘i Supreme Court rejected application for certiorari)

*State v. Kahana*, CAAP-17-0000359 (Hawai‘i Supreme Court rejected application for certiorari)

*State vs. Higa*, CAAP-17-0000544 (Hawai‘i Supreme Court rejected application for certiorari)

*State v. Shinsato*, CAAP-17-0000603 (Hawai‘i Supreme Court rejected application for certiorari)

*State vs. Luster*, CAAP-17-0000664 (Hawai‘i Supreme Court rejected application for certiorari)

*State vs. Chang*, CAAP-17-0000674 (Hawai‘i Supreme Court vacated conviction on other grounds)

*State vs. Davidson*, CAAP-18-0000845 (Hawai‘i Supreme Court rejected application for certiorari)

*State vs. Sharp*, CAAP-18-0000009

*State vs. Sebay*, CAAP-18-0000330

*State vs. Vasconcellos*, CAAP-19-0000465

*State vs. Skapinok*, CAAP-19-0000476

*State vs. Tronson*, CAAP-19-0000504

*State vs. Manion*, CAAP-19-0000563



NO. CAAP-19-0000491

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, ) CASE NO. 1DTA-18-01227  
)  
Plaintiff-Appellant, ) APPEAL FROM THE NOTICE OF  
) ENTRY OF JUDGMENT AND/OR  
vs. ) ORDER AND PLEA/JUDGMENT, filed  
) on June 7, 2019  
TIANA F.M. SAGAPOLUTELE-SILVA, )  
) DISTRICT COURT OF THE FIRST  
Defendant-Appellee. ) CIRCUIT  
) HONOLULU DIVISION  
)  
) HONORABLE SUMMER KUPAU-ODO  
) JUDGE

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**CERTIFICATE OF SERVICE**

I hereby certify that October 18, 2019, one (1) copy of the **Opening Brief** of the State of Hawai'i was served electronically through JEFS to:

ALEN KANESHIRO @ [alen@kaneshirolaw.com](mailto:alen@kaneshirolaw.com)

Attorney for Defendant-Appellee

/s/ BRIAN R. VINCENT  
Deputy Prosecuting Attorney  
City and County of Honolulu