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5TH CIRCUIT COURT
STATE OF HAWAII
CLERK *Frederica Olivas-Brown*

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

vs.

KUI PALAMA,

Defendant.

CR. NO. 11-1-0116

DEFENDANT'S MOTION TO DISMISS;
MEMORANDUM IN SUPPORT OF MOTION;
DECLARATION OF COUNSEL; NOTICE OF
HEARING; EXHIBITS A – D; CERTIFICATE
OF SERVICE

Hearing Date: March 13, 2012

Hearing Time: 9:00 a.m.

Presiding Judge: Kathleen N.A. Watanabe

DEFENDANT'S MOTION TO DISMISS

Defendant KUI PALAMA ("Mr Palama"), by and through his undersigned counsel, hereby moves the Honorable Court for an Order dismissing with prejudice the above-entitled case due to Constitutional and Statutory violations.

Specifically, the activity Mr. Palama engaged in on or about January 17, 2011, constitutes the exercise of native Hawaiian rights protected under the Hawaii Constitution.

This motion is brought pursuant to the article XII, § 7 of the Hawaii Constiution, and HRS §§ 7-1 and 1-1, exhibits, declarations, the law set forth in the attached memorandum, the records and files of the above-entitled case and the related cases discussed herein, and any and all evidence adduced at a hearing on the instant motion.

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STATE OF HAWAII

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MEMORANDUM IN SUPPORT OF MOTION

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STATEMENT OF FACTS

Defendant is charged with simple trespass in violation of HRS 708-815 of the Hawaii Revised Statutes, and hunting on private lands prohibited in violation of HRS 183D-26 of the Hawaii Revised Statutes.

According to the police reports provided by the State of Hawaii, on or about January 17, 2011, the Defendant was trespassing on Gay & Robinson's property; Gay and Robinson's security guard discovered the Defendant's vehicle parked on public property. Shortly thereafter, the security guard found the defendant on Gay & Robinson's property with a mutilated pig and a bag of pig meat.

The Defendant made the following paraphrased statement to police: "We always hunted there from kid time; I just figure hunting wouldn't be a problem; me an my family we eat the pig meat; I caught two pigs."

ARGUMENT

Defendant asserts that under the relevant statutory and constitutional framework, and the relevant case law, his alleged conduct was "traditional and customary", and therefore protected.

I. LEGAL ISSUES AND ANALYTICAL FRAMEWORK

1. Whether Defendant's conduct falls within the scope of constitutional protection.

To meet this burden, Defendant must bring forward sufficient evidence to satisfy, at a minimum, three legal criteria: (1) that he is a native Hawaiian; (2) that his claimed right is constitutionally protected as a customary or traditional native Hawaiian practice as codified—but not necessarily enumerated—in article XII, § 7 of the Hawai'i Constitution, HRS §§ 1–1 and/or HRS § 7–1; and (3) that the exercise of the right occurred on undeveloped or less than fully developed property. State v. Hanapi, 970 P.2d 485, 493–94, 89 Haw. 177, 186–86 (1998)

2. Whether the State's prosecution of Defendant's constitutionally protected rights is reasonable in light of the State's interest in governing the exercise of those rights.

Assuming Defendant establishes that his conduct falls within the scope of constitutional protection, this Honorable Court may then apply the evidence to a balancing test. The test weighs the State's obligation to protect the reasonable exercise of traditional rights against the State's competing interest of governing those rights. Public Access Shorelines Hawaii v. Hawaii County Planning Comm. (hereinafter “PASH”), 79 Haw. 425, 903 P.2d 1246 (1995).

II. THE PASH LINE OF CASES, AND HAWAII'S UNIQUE PROPERTY LAW FRAMEWORK, SUPPORT GRANTING DEFENDANT'S MOTION TO DISMISS.

Hawai'i's concepts and laws relating to land tenure are unique within United States law. See PASH., 79 Haw. 425, 442, 447, 903 P.2d 1246, 1263, 1268 (1995) (“Traditional and customary rights are properly examined against the law of property as it has developed in this state” and “the western concept of exclusivity is not universally applicable in Hawai'i”); see also D. Kapua Sprout, “The Backlash Against PASH: Legislative Attempts To Restrict Native Hawaiian Rights” 20 Hawaii L. Rev. 321 (1998).

The relevant statutory and constitutional provisions which guide Hawaii's unique framework are Haw. Rev. Stat. § 7-1, Haw. Rev. Stat. § 1-1, and Article XII, section 7 of the Hawaii Constitution.

Haw. Rev. Stat. § 7-1 provides:

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

Haw. Rev. Stat. § 1-1 provides:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State (emphasis added).

Finally, Article XII, section 7 of the Hawaii Constitution provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua' a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

An overview of the case law interpreting these provisions is instructive.

In Kalipi v. Hawaiian Trust Co., Ltd., the plaintiff was claiming the right to enter adjacent privately owned property to "gather indigenous agricultural products for use in accordance with traditional Hawaiian practices." 66 Haw. 1, 3-4, 656 P.2d 745 (1982). The court analyzed the claims under each of the sources plaintiff claimed supported his asserted right:

Haw. Rev. Stat. § 7-1; Haw. Rev. Stat. § 1-1; and Article XII, section 7 of the Hawaii Constitution. The court carefully pointed out that

We recognize that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land. But any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail. For the court's obligation to preserve and enforce such traditional rights is a part of our Hawaii State Constitution[.] Id. at 748.

The court then addressed HRS §7-1 as a source for plaintiff's gathering rights, as an issue of first impression. Id. The court reviewed the history and intention of § 7-1, to insure that tenants would be able to exercise gathering rights in the ahupuaa in which they lived. Id. at 748-749. Noting the challenge in balancing such gathering rights with the modern system of land tenure in which the right to exclude is perceived as integral to land ownership, resolved that:

We believe this balance is struck, consistent with our constitutional mandate and the language and intent of the statute, by interpreting § 7-1 to assure that lawful occupants of an ahupuaa may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupuaa to gather those items enumerated in the statute. Such activities would, of course, be subject to further governmental regulation. Id. at 749.

Because plaintiff did not reside on the property he owned in the ahupuaa, the court held that "as a matter of law, he was not entitled to the privileges discussed above." Id. at 750.

The court in Kalipi also interpreted HRS § 1-1, and held that its "Hawaiian usage" clause may establish certain customary Hawaiian rights beyond those found in HRS § 7-1. Id. at 751. But again, because plaintiff did not reside on the property he owned in the ahupuaa, he would have no gathering rights pursuant to HRS § 1-1. Id. at 752.

In a later case, the court summed up Kalipi as upholding, "rights of native Hawaiians to enter undeveloped lands owned by others to practice continuously exercised access and gathering

rights necessary for subsistence, cultural or religious purposes so long as no actual harm was done by the practice.” Pele Defense Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247 (1992).

In Pele Defense Fund v. Paty, the Hawai’i Supreme Court directly addressed the range of protections provided by Article XII, Section 7, and HRS § 7-1. The court addressed the issue of balancing interests by noting, “The ‘undeveloped lands’ limitation was imposed by the [Kalipi] court to balance the concept of land ownership with that of native rights.” Id. at 618.

The court found that the drafters of Article XII, Section 7 “intended this provision to protect the broadest possible spectrum of native rights[.]” Id. at 619. Noting that Kalipi had based his claims on land ownership while Pele Defense Fund’s claims were based on custom and usage, the court held that “native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua’a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.” Id. at 620.

In Public Access Shorelines Hawaii v. Hawaii County Planning Comm., 79 Haw. 425, 903 P.2d 1246 (1995), the court engaged in a balancing analysis.

[T]he balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing non-traditional practices or exercising otherwise valid customary rights in an unreasonable manner. PASH, 79 Haw. at 442 (emphasis added).

The court went on.

Traditional and customary rights are properly examined against the law of property as it has developed in this state. Thus, the regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of “property.” PASH at 442.

The court also addressed the state’s right to regulate: “[T]he State retains the ability to reconcile competing interests under article XII, section 7. We stress that unreasonable or non-traditional uses are not permitted under today’s ruling.” PASH at 447.

Finally, in State v. Hanapi, 970 P.2d 485, 492, 89 Haw. 177, 184 (1998), the Hawai'i Supreme Court reviewed that Court's case law regarding protection of traditional and customary rights:

This court has consistently recognized that "the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7." Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Haw. 425, 442, 903 P.2d 1246, 1263 (1995) (hereinafter "PASH") (emphasis in original). See also Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982) (recognizing Hawaii's constitutional mandate to protect traditional and customary native Hawaiian rights); Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992)) (upholding the "Kalipi rights" defining the "rudiments of native Hawaiian rights protected by article XII, § 7" of the Hawai'i Constitution). In PASH, we further examined the legal developments of land tenure in Hawai'i and concluded that "the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property."

Although PASH did not discuss the precise nature of Hawaii's "limited property interest," one limitation would be that constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes.

Id.

Article XII, section 7 of the Hawaii Constitution expressly provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua' a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

II. DEFENDANT WILL MEET HIS BURDEN UNDER STATE V. HANAPI.

In State v. Hanapi, 970 P.2d 485, 493-94, 89 Haw. 177, 186-86 (1998), the Hawai'i Supreme Court applied PASH to the criminal defense context and articulated that a criminal defendant claiming a PASH privilege must prove three elements: (1) he or she must qualify as a "native Hawaiian" within the guidelines set out in PASH; (2) his or her claimed right is

constitutionally protected as a customary or traditional native Hawaiian practice; and (3) the exercise of the right occurred on undeveloped or less than fully developed property.

Based on applicable case law and the expected evidence at the hearing on the instant motion, Defendant will establish his Hanapi/PASH defense, satisfying all three prongs.

A. First Prong: Defendant Is a “Native Hawaiian” Within the PASH Definition.

PASH states that

those persons who are ‘descendants of native Hawaiians who inhabited the islands prior to 1778,’ and who assert otherwise valid customary and traditional Hawaiian rights are entitled to [constitutional] protection regardless of their blood quantum. . . . Customary and traditional rights in these islands flow from native Hawaiians’ pre-existing sovereignty. The rights of their descendants do not derive from their race per se, and were not abolished by their inclusion within the territorial bounds of the United States. Hanapi, *supra*, 89 Haw. at 186 *quoting* PASH, 79 Haw. at 449 (emphasis added).

In the case at bar, Defendant and his family are familiar with their family history and Defendant is a descendant of Native Hawaiians who inhabited Hanapepe Valley, Kauai, Hawaii prior to 1778.

In Hawaii, Courts accept “kama‘aina” witness testimony. State v. Hanapi, 970 P.2d 485, 495 (Haw. 1998). Expected kama‘aina witnesses are Lavern Silva, Elvin K. Kaiakapu, and Herbert Holt Lonoikamakahiki Kauahi. See attachment A: Palama Family Tree prepared and kept by Lavern Silva; see also Attachment B: Resume of Elvin K. Kaiakapu; see also Attachment C: Resume of Herbert Holt Lonoikamakahiki Kauahi.

Defense expects to put on credible evidence through Defendant’s testimony and kama‘aina testimony regarding family genealogy, which collectively demonstrate that Defendant is Native Hawaiian.

B. Second Prong: Defendant Will Establish Through Kama‘aina and Expert Testimony That His Claimed Rights Are Constitutionally Protected as Customary or Traditional Native Hawaiian Practices Under HRS § 7-1 and/or HRS § 1-1.

a. HRS § 7-1

As discussed above, the supreme court has held that HRS § 7–1 and article XII § 7 of the Hawai‘i Constitution assure that lawful occupants or tenants of an ahupuaa may, for the purpose of practicing continuously exercised native Hawaiian customs and traditions, enter undeveloped lands within the ahupua‘a to gather the items enumerated in the statute, subject to regulation. See Kalipi, at 751–52; see also HRS § 7–1. These rights are rights to water, access, and collection of various materials naturally found on the land for subsistence, cultural, and religious purposes. State v. Pratt, 243 P.3d 289, 311 (Haw. Ct. App. 2010) cert. withdrawn, SCWC-27897, 2011 WL 1090187 (Haw. Mar. 18, 2011) and cert. granted, SCWC-27897, 2011 WL 1523485 (Haw. Apr. 21, 2011)

b. HRS § 1-1

Hawaiian rights ‘protected by article XII, § 7 may extend beyond the ahupua‘a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner. Id.

c. Application

Hawai‘i law protects practices associated with the ancient way of life that have been continued, without harm to anyone. Non-traditional uses are not permitted; furthermore, in order for a Defendant to meet his burden, he must bring forward evidence that the practice handed down was an established native Hawaiian custom or tradition prior to 1892. See generally State v. Pratt.

The Supreme Court has noted that a defendant may lay the required foundation connecting his claimed right to a firmly rooted traditional or customary native Hawaiian practice through expert testimony. Hanapi at 495.

Defense has secured expert witness Jonathan Kay Kamakawiwo'ole Osorio, Ph.D. ("Dr. Osorio") to testify at the hearing on the instant motion. Dr. Osorio is a professor at the Center for Hawaiian Studies at the University of Hawaii. See Attachment D: Curriculum Vitae of Jonathan Osorio. Defendant expects Dr. Osorio to testify, based on his experience, training, and education, that Mr. Palama's conduct on or about January 17, 2011 constitutes established native Hawaiian customs or traditions prior to 1892.

In the case at bar, Mr. Palama and his family members occupy part of the same ahupuaa where Gay and Robinson's property is located. Specifically they occupy the lowland cultivated area of the ahupuaa.¹

The Palama family maintains a taro farm on the lowland area of the subject ahupuaa.

Mr. Palama is expected to testify that he and family hunt pig for food and subsistence. In addition, they hunt pig to keep the pig population down in the subject ahupuaa. If pig is not hunted, the pig population grows out of control and destroys taro patches kept and maintained by the Palama family.

Mr. Palama consistently checks on the running water on the subject ahupuaa from the lowland cultivated area up through the upland forested region; this running water passes through Gay and Robinson's property. The Palama family frequently follows and inspects the water to

¹ An ahupua'a consists of a slice of the island from the top of the mountain to the shore, often following the boundary of a stream drainage. Each ahupua'a includes a lowland (cultivated area) and upland forested region.

see where the water is flowing from; it is critical to inspect the quality of water feeding their taro patches and the water in which they toil everyday.

For the above reasons, Mr. Palama's activities are established native Hawaiian customs or traditions, which trigger protection under HRS § 7-1, HRS § 1-1, and Article XII, Section 7.

C. Third Prong: Defendant Was Exercising His Rights On Undeveloped Or Less Than Fully Developed Property.

The testimony at the hearing on this motion will clearly establish that that the subject property of the alleged trespass was less than fully developed.

D. The State's Criminal Prosecution of the Defendant's Activities in Hanapepe Valley is Not Narrowly Tailored to Meet a Compelling Government Interest.

Assuming Defendant meets his burden, the Court must then reconcile competing interests and only uphold such rights and privileges reasonably exercised and to the extent feasible and subject to the right of the State to regulate such rights. See Article XII, section 7, Hawaii Constitution; PASH, 79 Hawai'i 425 [903 P.2d 1246] (1995).

The government must protect "... rights of native Hawaiians to enter undeveloped lands owned by others to practice continuously exercised access and gathering rights necessary for subsistence, cultural or religious purposes so long as no actual harm was done by the practice." Pele Defense Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247 (1992).

These rights are properly examined against the law of property as it has developed in this state. Thus, the regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of "property." PASH at 442.

In the case at bar, there is nothing unreasonable about Mr. Palama's activities; he was not hindering any person, thing, or entity. Mr. Palama practiced his gathering rights in the least

intrusive manner possible—no vehicle, no guns, and no damage to any property. If anything, Mr. Palama's activity is helpful to the maintenance, protection, and preservation of land quality on Kauai. This Court should not simply rule on the "escape hatch" of the State's regulatory powers in protecting the western paradigm of privatized property interests.

Again, Hawaii is unique in that the western concert of property exclusivity is not universally applicable.

Defense submits that Mr. Palama's interests, when balanced against those of the State, weigh heavily in his favor because he practiced his traditional gathering rights in a reasonable matter with no harm to any person or entity.

CONCLUSION

For the above reasons, Defendant requests that this Court grant the instant Motion.

DATED: Lihue, Hawai'i, 2-9-2012.



TIMOTHY J. TOBIN
Attorney for Defendant