CAAP-12-0000456

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v. MICHAEL GLENN SULLIVAN, ROLANDO ALEGADO AGUSTIN Defendants-Appellants.	)	CAAP-12-0000456 CR. NO. 10-1-0153 APPELLEE MICHAEL GLENN SULLIVAN'S ANSWERING BRIEF Circuit Court of the Fifth Circuit Hon. Judge Kathleen N.A. Watanabe

APPELLEE MICHAEL GLENN SULLIVAN'S ANSWERING BRIEF
(Certificate of Service)

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APPELLEE MICHAEL GLENN SULLIVAN'S ANSWERING BRIEF

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I. SUMMARY OF CASE

The police arrested defendant Sullivan on March 16, 2010 after allegedly observing him throw a package over a fence. Agustin, who was at work at nearby Gas Company, was also arrested. After being arrested they were questioned in violation of Miranda. The police applied for and obtained a search warrant and upon searching the subject package allegedly found that that it contained cocaine.

The alleged probable cause in support of the warrant was: 1) Information from a confidential source, 2) Defendants' statements to police, and 3) An alleged alert to the presence of drugs in the bag (before the search warrant) by a drug-sniffing dog named Simon.

The Circuit Court granted defendants' Motions to Suppress the Search Warrant after finding that the evidence in support of the warrant was either fabricated or had been illegally obtained. Specifically, the Circuit Court found: 1) the confidential source had not been corroborated as the police had represented in the application in support of the search warrant; 2) The defendants' statements were made after unlawful arrests that were not based on probable cause; and 3) Simon the dog did not alert to the subject package as the police represented in the affidavit in support of the warrant. Thus, the Court found that none of the alleged factual predicates supporting the warrant were true.

After the hearing and ruling on the first Motion to Suppress, the State challenged defendants' standing to contest the warrant, but the Court held that the issue had been waived.

Prior to filing a Notice of Appeal of the granting of the Motions to Suppress, the State appeared on the scheduled trial date and moved for a continuance. The motion was denied. The State was unable to proceed with trial.

The Court then granted Defendants' Motions to Dismiss, also made on the day of trial.

On appeal, the State does not specifically contest any factual finding by the Circuit Court. However it generally appeals the suppression and dismissal orders.

II. FACTS AND PROCEDURAL HISTORY

Appellees were indicted on June 9, 2010. ROA p.1. They were charged with Promoting a Dangerous Drug in the First Degree, in violation of HRS 712-1241 (I)(a)(i), and several lesser charges. Id. The cases turned on the search of a bag, which a police officer allegedly saw defendant Sullivan throw from Young Brothers Kauai to an adjoining property owned by the Gas Company, where Agustin worked.

On August 31, 2010, defendant Michael Sullivan filed a Motion to Suppress Due to Lack of Probable Cause for Issuance of Warrant. ("First Motion to Suppress"). ROA p.10. Defendant Agustin joined Sullivan's Motion to Suppress. ROA p. .17. The Motion sought suppression because, inter alia, the certified copy of the original affidavit in support of the search warrant that was provided to the defense in discovery was not signed under oath[1]. See Declaration of Counsel, Motion to Suppress. p. 2. ¶ 3. ROA at p. 10. (ROA PDF Vol. 1 p. 38). That Motion to Suppress went to a hearing on October 13, 2010.

On October 20, 2010, a week after the hearing on the first Motion to Suppress, the State filed a Motion to Determine that the Defendant Sullivan had no Reasonable Expectation of Privacy in the Subject Package and that Defendant Agustin Lacked Standing to Challenge the Search Warrant ROA Vol. 1, P.23.

In that Motion, the State represented, "That at approximately 6:50 AM KPD officer Daniel Oliveira saw [defendant] Sullivan toss a package over the fence from Young Brothers to the Gas Company yard. That that the defendants were then detained [by the police] and made incriminating statements."

The State's Motion contended that defendant Agustin then "led" the police to the subject package where a trained drug sniffing dog (Simon) then "alerted" to the

[1] This issue was ultimately resolved when the State produced the original application in support of the search warrant, which did bear the officer's signature, instead of the certified copy, which had previously been provided to the defense in discovery, but which did not bear the signature. See Declaration of Deputy Prosecuting Attorney Sam Jajich at ¶4(j), in support of State's Memorandum in Opposition to Defendant's Motion to Suppress Evidence, filed October 13, 2011. ROA Vol. 1. p. 18.

package – indicating the presence of illegal drugs. The State then sought and obtained a warrant to search the contents of the bag. After the warrant was issued, the police allegedly searched the bag and discovered cocaine.

See State Of Hawaii's Motion to Determine that Defendant Michael Glenn Sullivan has No Reasonable Expectation of Privacy in the Property that he Seeks to Suppress as Evidence in Defendant Michael Glenn Sullivan's Motion to Suppress Evidence Due to Lack of Probable Cause for Issuance of Warrant. Memo at p. 4-5. ROA Vol. 1, P.23.

A hearing was held on the State's Motion on October 26, 2010. The Court held that the State had waived the issue of standing by proceeding with the hearing on the first Motion to Suppress without contesting the issue. See Order Denying State Of Hawaii's Motion To Determine That Defendant Michael Glenn Sullivan Has No Reasonable Expectation Of Privacy, filed April 20, 2011. (Herein "Order Re: Standing") ROA Vol. 2. p. 58.

The Court based its ruling that the standing issue had been waived on the fact that the State had already litigated the first Motion to Suppress without raising a challenge to standing. Thus, in its Order denying the State's motion the Court found:

> 3. On October 11, 2010, the State of Hawaii filed its Opposition to Defendant Michael Glenn Sullivan's Motion to Suppress Evidence Due to Lack of Probable Cause for Issuance of Warrant wherein the State of Hawaii did not argue that Defendant Michael Glenn Sullivan did not possessed a reasonable or legitimate expectation of privacy to the object which was the subject of the search warrant.
>
> 5. The State of Hawaii did not present any evidence or any argument, written or oral, that Defendants Michael Glenn Sullivan and Rolando Agustin did not possess a legitimate expectation of privacy to the item, which was the subject of the search warrant during the suppression hearing held on October 13, 2010.

> 6. The State of Hawaii acquiesced that Defendant Michael Glenn Sullivan possessed a legitimate expectation.[2]

Order Re: Standing, FOF 3,5 & 6. ROA Vol. 2. p. 59.

On March 8, 2011 defendant Sullivan filed a Motion to Clarify the Findings of Fact Conclusions of Law and Order, (herein, "Motion to Clarify") ROA p. 45, (PDF Vol.2 p. 28), related to the Order Re: Standing. ROA Vol. 2, P.58. Appellant asked the court to clarify its Order Re: Standing. because:

> "The Findings of Fact numbered 6 finds that the State of Hawaii waived their right to challenge the issue the defendant Sullivan had no reasonable expectation of privacy as the State of Hawaii did not raise it in its memorandum or during the hearing on the motion. However, Conclusion of Law numbered 3 states that the State of Hawaii is not precluded from raising the issue at a later time. The Conclusion of Law is inconsistent with the courts findings, and therefore the order filed February 23, 2011 must be clarified.

Declaration of Counsel in Support of Motion to Clarify, ¶6, ROA Vol. 2, P.45.

On April 20, 2011, the Court filed its ORDER GRANTING DEFENDANT MICHAEL GLENN SULLIVAN'S MOTION TO CLARIFY STATE OF HAWAII'S FINDINGS OF FACT, CONCLUSIONS OF LAW. ROA Vol. 2, P.62; and the Order Re: Standing. Id. at. 58. In paragraph 2 of that April 20, 2011 Order[3], the Court adopted the proposed Order, previously filed on February 23, 2011 by the defendant. ROA at Vol. 2 p. 58. In *that* Order the Court made the following findings of fact:

> 3. On October 13, 2010, a hearing of the motion was held whereby the State of Hawaii and defendants stipulated to the introduction of their respective warrants for hearing. There were no witnesses called by the State of Hawaii to testify on its behalf. The attorneys presented their arguments, and at the conclusion of the hearing, the attorneys were instructed to submit findings of fact and

[2] The State does not challenge this Order on appeal.
[3] ROA at Vol. 2 p. 63.

> conclusions of law to the court by Wednesday, October 27, 2010.
>
> 4. The State of Hawaii did not present any evidence or any argument, written or oral, the defendants Michael Glenn Sullivan and Rolando Agustin did not present possess a legitimate expectation of privacy to the item which was the subject of the search warrant during the suppression hearing held on October 13, 2010.
>
> 5. The state of Hawaii acquiesced that defendant Michael Glenn Sullivan possessed a legitimate expectation of privacy based upon its argument during a hearing of defendant's motion to suppress.
>
> 8. On October 26, 2010, based upon the court's order denying the State's motion to present supplemental evidence to the October 13, 2010 hearing, the court found that based upon the hearing held on October 13, 2010, the State of Hawaii had waived the issue and may not now argue the defendants have no reasonable expectation of privacy to object to what was the subject of the search warrant.

The Court's two resulting conclusions of law were:

> 1. The state of Hawaii waived the issue the defendants Michael Glenn Sullivan and Rolando Agustin lacked standing or failed to possess a reasonable expectation of privacy to the item that was the subject of the search warrant.
>
> 2. The State of Hawaii acquiesced that defendant Michael Glenn Sullivan and Rolando Agustin possessed a legitimate expectation of privacy to the item that was the subject of the search warrant.

In its Opening Brief, the State does not challenge either order regarding standing or any of the Circuit Court's Findings of Fact or its Conclusion that the issue of standing was waived below[4].

[4] Instead the State's Opening Brief erroneously contends that the "Court … *failed to rule* that neither defendant had a reasonable expectation of privacy in the package

In the meantime, on March 8, 2011 defendant Sullivan filed a second Motion to Suppress Evidence. ROA p.45. (PDF at Vol. 2 p. 15/280). This motion sought: 1) "Suppression of statements and …evidence as a result of an arrest where probable cause did not exist; and 2) Suppression of evidence and statements obtained in violation of the fifth and 14th amendments to the United States Constitution and Article 1 Section 10 of the Hawaii State Constitution. Motion to Suppress filed March 8, 2011. P.2. ROA Vol. 2, P.45. Defendant Agustin joined that Motion on May 12, 2012. ROA p.56.

In that Motion to Suppress, Sullivan argued that the "affidavit […] supporting the issuance of the search warrant contains numerous false statements. The false information relates to the observations on March 16, 2010, [the date of arrest] and the canine sniff of said vehicle on March 9, 2010, which are linked to be the same vehicle." Motion to Suppress, filed March 8, 2011. P.2. ROA Vol. 2, P.45.

Evidentiary hearings were held on March 29, 2011; May 17, 2011; June 20, 2011; June 28, 2011; August 29, 2011; September 19, 2011; October 27, 2011; December 1, 2011; December 2, 2011; January 12, 2012; and February 16th 2012. The parties argued extensively over whether the warrant was supported by probable cause.

On January 6, 2012 Appellee Sullivan filed a Supplemental Memorandum to Defendant Michael Sullivan's Motion to Suppress Evidence filed on March 8, 2011. (ROA PDF at Vol. 2 p. 164/280). On that same day Sullivan filed a Motion to Strike, asking the Court to strike the dogs sniff evidence of March 16, 2010, because the State of Hawaii failed to lay a sufficient foundation for its admission. (ROA PDF at Vol. 2 p. 171/280). In the January 6, 2012 Supplemental Memorandum, Defendant Sullivan summarized that there was no remaining legal probable cause to justify the warrant, after false information set forth in the affidavit was removed.

On January 31, 2012 Court filed its ORDER DENYING DEFENDANTS MOTION TO STRIKE. ROA at 83. (PDF Vol. 2 at 200/280). The court held that the foundational issues with respect to whether the dog had properly alerted to the

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searched." Appellant's Opening Brief, p. 15. The Court did not fail to rule. It ruled that the issue was waived. That ruling regarding has not been contested on appeal.

subject package went to the weight, and not to the admissibility of the dog sniff evidence. Id. at p. 2.

On April 10, 2012 the court signed and filed Defendant Michael Sullivan's Findings of Fact and Conclusions of Law and Order granting his Motion to Suppress. (herein: "*Sullivan FOF/COL*"). ROA at 89.

On the same day the court signed and filed Findings of Fact, Conclusions of Law, and Order Suppressing Evidence and Statements of Defendant Rolando Agustin, Filed April 10, 2012. (herein: "*Agustin FOF/COL*"). ROA p. 90. (P 53/280 Vol. 3 PDF).

The Court's Orders invalidated the finding of probable cause for the issuance of the search warrant based on three dispositive Findings of Fact: 1) Simon the dog did not alert to the subject package, and the police misrepresented that the dog had alerted in the affidavit in support of the warrant; 2) the confidential source had not been corroborated as the police had represented in obtaining the warrant; and 3) the defendants' statements were made after unlawful arrests that were not based on probable cause. After disposing of these three factual findings, the Court found that there was no evidence left that would have supported the search warrant.

The Court's findings of fact were largely based on its determination as to credibility of the witnesses. Id. For example, the *Sullivan FOF/COL* with respect to the alleged dog alert includes:

> *Sullivan COL #22* "The affidavit of Officer Pia in support of the search warrant application contains material misstatements of fact;"
>
> *Sullivan FOF #9*. "Officer Pia did not know if the information that the CS provided to her was a lie. TR. 8/29/11, pp. 55, 57~58."
>
> *Sullivan COL #23* "Officer Cayabyab's intentional omission of Simon's final response of lying down next to the package was a material misstatement of fact. See Exhibit D-1. Attachment III."
>
> *Sullivan COL #14* "Officer Cayabyab's testimony of there being a positive response lacks credibility."

> *Sullivan FOF #47.* "Simon's final response and Officer Cayabyab's indication of April 6, 2010, may not be used to establish probable cause for Defendant Sullivan and Agustin's arrest." Exhibit D-1 Attachment III p. 124, T. *12/1111,* p. 43.

Thus the Court plainly held that Simon the dog did not alert to the subject package, as was falsely represented to the warrant- issuing judge in the affidavits in support of the search warrant.

The Court then followed State v. Sepa, 72 Haw. 141, 144, 808 P.2d 848. (1990), and excised the alleged dog alerts from its probable cause determination.

The Court also found that any incriminating statements the defendants made were the result of unlawful custodial interrogation after arrest. See *Agustin FOF #53*, "The statement of Defendant Agustin was the result of the unlawful detention, seizure and arrest of Defendant Agustin." *See Sullivan COL #15*, "Defendant Sullivan's statement obtained following an illegal arrest must be suppressed." *Sullivan FOF #35*, "Defendants Sullivan and Agustin were arrested prior to the canine screening and prior to the testing of any of the contents of the bag." *Sullivan COL #4*, "The "detention" by police officers of defendants Sullivan and Agustin was an arrest as Defendant was not to leave seizure was not investigatory. State v. Lloyd, 61 Haw. 505, 509, 606 P.3d. 913,916 (1980)."

Appellant offers no facts to suggest that the Court abused its discretion in making credibility determinations about the police affidavits or testimony related to the arrest of the defendants, and it does not argue with the Court's findings of fact.

The Court also found that a police sergeant Darren Rose had also been dishonest to the Court about the arrest. Detective Rose had testified that at the initial encounter, defendant Agustin had a large white "itinerary bag" with him at his place of work at the Gas Company, and Rose testified that did not search it, but the bag was open and its contents were in plain view[5] when Rose approached Agustin.

[5] The Court wrote "Sergeant Rose testified that the zipper was unzipped and he could see the contents in plain view. *Sullivan FOF* # 29.

However, the Court *found* that Rose had forcibly searched the bag, after an independent witness, Mr. Unciano, directly contradicted the KPD sergeant.

> *Agustin FOF #34*. Mr. Unciano further testified that he saw Sgt. Rose struggling and trying to open the itinerary bag. During his testimony, Mr. Unciano demonstrated a pulling motion that he observed Sgt. Rose do three or four times trying to open the bag.

The Court accepted Mr. Unciano's testimony as true and rejected KPD sergeant Rose's testimony as false. *Agustin FOF #34-37*, ROA Vol. 3. p. 90. (P 53. Vol. 3 PDF).

> 37. The Court finds that Mr. Unciano is credible and has no stake in the outcome of this case. The Court finds that the zippered itinerary bag that Rose seized from Defendant Agustin was closed when it was seized by sergeant Rose. Further that Sergeant Rose struggled with the bag it, then unzipped the zipper opening, then searched the bag. *Agustin FOF # 37.*

The Court also found that the initial report to the police by the confidential source had not been corroborated, contrary to what the police had represented in the application in support of the search warrant.

> "At the time Sergeant Rose approached Defendant Agustin his investigation had failed to produce any evidence that Defendant Agustin was involved in criminal activity. The information provided by the CS, as it related to Defendant Agustin, had been wholly uncorroborated other than the fact that he was employed at the Gas Company." *Agustin COL # 6*.

After finding that the CS was uncorroborated, that the dog did not alert and that the defendant's alleged statements had been obtained illegally, the Court granted the Motion to Suppress in both cases. See *Agustin FOF/Col* ROA Vol. 3. p. 90. (P 53. Vol. 3 PDF), and *Sullivan FOF/COL,* infra.

Until that point the trial date had been continued several times. The final trial date was set for May 7, 2012.

On the May 7, 2012 trial date, prior to filing any Notice of Appeal of the Order suppressing evidence, the State appeared on the scheduled trial date and orally moved for a continuance of the trial.

The Court denied the states motion to continue the trial. Ruling from the bench, the court granted the defendants motion dismiss the case.

The Circuit Court filed the written Order dismissing the case on June 8, 2012. ROA p. 99. (ROA PDF Vol. 3 p. 135).

III. STANDARD OF REVIEW

The State's brief fails to set forth any standard of review that would apply as to its first, third, and fourth points of error. Instead it sets forth the basic right/wrong standard for issues of law related to suppression motions. State v. Spillner, 116 Hawai'i 351, 357, 173 P.3d 498, 504 (2007). State v. Kaleohano, 99 Hawai'i 370, 375, 56 P.3d 138, 143 (2002).

Appellant's standard of review is correct as to de-novo review of legal determinations of probable cause, but it neglects to include any standard of review with respect to the Court's ruling as to the State's waiver on the standing issue, the Court's findings that none of the material facts set forth in the application in support of the search warrant were true, its findings related to the credibility of the police officers, or the denial of a continuance and resulting dismissal of the case.

With respect to the Court's unchallenged ruling that the State waived the issue of standing:

"It is well-established in this jurisdiction that, where a party does not raise specific issues on appeal to the ICA or on application to this court, the issues are deemed waived and need not be considered. E & J Lounge Operating Co., Inc. v. Liquor Comm'n of the City & County of Honolulu, 118 Hawai`i 320, 347, 189 P.3d 432, 459 (2008); see also Ass'n of Apartment Owners of Newtown Meadows ex. rel. its Bd. of Dirs. v. Venture, 15, Inc., 115 Hawai`i 232, 257, 167 P.3d 225, 250 (2007) (concluding that the appellant's contentions on application were "deemed waived" because they did not "assign as error" or "present any argument" regarding the circuit court's ruling.

It is also well-settled that all unchallenged conclusions by the circuit court are considered binding upon this court. Wong v. Cayetano, 111 Hawai`i 462, 479, 143 P.3d 1, 18 (2006) (citation omitted). Trust v. v. Association of Apartment Owners of the Kaanapali Alii 221 P.3d 452, 466-467, 121 Haw. 474 (2009).

"[A]ppellate courts will give due deference to the right of the trier of fact 'to determine credibility, weigh the evidence, and draw reasonable inferences from the evidence adduced.'" State v. Agard, 113 Hawai'i 321, 324, 151 P.3d 802, 805 (2007).

With respect to the State's argument that the Court "erred" when it dismissed the case after the State's Motion for a Continuance was denied:

"Generally, a request for continuance is subject to the sound discretion of the trial court, and a grant or denial of continuance will not be disturbed on appeal absent a showing of abuse of that discretion. " State v. Lee, 9 Haw.App. 600, 603, 856 P.2d 1279, 1281, reconsideration denied, 9 Haw.App. 660, 861 P.2d 767, cert. denied, 75 Haw. 581, 861 P.2d 735 (1993).

"A ... court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." Abastillas v. Kekona, 87 Hawai'i 446, 449, 958 P.2d 1136, 1139 (1998) (quoting Kawamata Farms, 86 Hawai'i at 241, 948 P.2d at 1082 (citation omitted)).

Finally, a trial court's findings of fact will not be disturbed on appeal unless they are clearly erroneous. State v. Ortiz, 91 Hawai'i 181, 189, 981 P.2d 1127, 1135 (1999), State v. Young, 93 Hawai'i 224, 230-231, 999 P.2d 230, 236 - 237 (Hawai'i,2000).

IV. ARGUMENT

A. APPELLANT FAILED TO CHALLENGE THE CIRCUIT COURT'S RULING THAT THE APPELLANT HAD WAIVED ANY OBJECTION TO DEFENDANT'S STANDING, AND THAT UNCHALLENGED RULING IS BINDING ON APPEAL.

HRAP Rule 28(b)(4)(C) requires that an appellant must specifically set forth a concise statement of the points of error, including, "the alleged error committed by

the court" and provide "either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusions…" Id.

"Points not presented in accordance with HRAP Rule 28(b)(4) will be disregarded." HRAP Rule 28(b)(4).

"It is well-established in this jurisdiction that, where a party does not raise specific issues on appeal to the ICA or on application to this court, the issues are deemed waived and need not be considered. E & J Lounge Operating Co., Inc. v. Liquor Comm'n of the City & County of Honolulu, 118 Hawai`i 320, 347, 189 P.3d 432, 459 (2008); see also Ass'n of Apartment Owners of Newtown Meadows ex. rel. its Bd. of Dirs. v. Venture 15, Inc., 115 Hawai`i 232, 257, 167 P.3d 225, 250 (2007) (concluding that the appellant's contentions on application were "deemed waived" because they did not "assign as error" or "present any argument" regarding the circuit court's ruling).

Here, the State has not contested any specific finding of fact or conclusion of law related to the Court's ruling that the State waived and acquiesced on the standing issue[6]. The State does not cite to the Order denying its Motion Re: Standing in its Notice of Appeal nor does it mention the Order Re: Standing or the Order Granting the Motion to Clarify in its Opening Brief.

Appellees contend that the State has waived the opportunity to question the Court's Ruling Re: Standing on appeal, and inquiry into the Court's Ruling Re: Standing is barred by HRAP 28(b)(4).

It is also well-settled that all unchallenged conclusions by the circuit court are considered binding upon this court. Wong v. Cayetano, 111 Hawai`i 462, 479, 143 P.3d 1, 18 (2006) (citation omitted). Alvarez family Trust v. v. Association of Apartment Owners of the Kaanapali Alii 221 P.3d 452, 466-467, 121 Haw. 474 (2009).

Here, throughout the entire October 13, 2010 hearing on the first Motion to Suppress, the State did not contest standing. The Court concluded:

[6] Appellees have not substantively briefed the issue of waiver or acquiescence in this brief because the State has not challenged the Order Re: Standing on appeal.

> 1. The State of Hawaii waived the issue the defendants Michael Glenn Sullivan and Rolando Agustin lacked standing or failed to possess a reasonable expectation of privacy to the item that was the subject of the search warrant.
>
> 2. The State of Hawaii acquiesced that defendant Michael Glenn Sullivan and Rolando Agustin possessed a legitimate expectation of privacy to the item that was the subject of the search warrant.

Order Denying State Of Hawaii's Motion To Determine That Defendant Michael Glenn Sullivan Has No Reasonable Expectation Of Privacy, filed April 20, 2011. *COL # 1-2*. (Order re: Standing) ROA p. 58. (PDF Vol. 2 p. 58).

The State has not appealed this ruling or even mentioned it in its opening brief. It has not pointed to: "either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusion."

In it's Opening Brief, the State contends (in the Points of Error Section) that it properly raised the standing issue below "orally … at the February 16, 2012 hearing" [where it argued that] "neither one of [the defendant's] have standing to contest probable cause for the warrant." Appellant's Opening Brief at p. 12.

However, the Court had ruled on the standing issue on April 20, 2011, and by time of the February 16, 2012 hearing where the State now claims the issue was wrongly decided below, the issue had long since been held to have been waived. Indeed the issue was not even properly before the Circuit Court on February 16, 2012. The State cannot be said to have properly preserved an objection to an April 20, 2011 Order, by pointing out that that it complained about the Order on February 16, 2012, when the matter was not even properly before the Court.

The State also represents that it raised the standing issue in State of Hawai'i's Memorandum in Opposition to Defendant Michael Glenn Sullivan's Motion to Suppress Evidence, which the State filed on May 12, 2011. ROA Vol. 2, p. 56, (PDF Vol. 2 p. 72-74/280). Opening Brief p. 12. However, as previously noted, the Circuit Court ruled that the issue was waived in October 2010 , and the issue was not properly raised or even before the Court on May 12, 2011.

Accordingly, the State's first point of error – alleging that the Court "… *failed to rule* that neither defendant had a reasonable expectation of privacy in the package searched" is misleading and misstates the record below. Moreover, the State does not identify any point in the record where the State properly objected to the ruling that it acquiesced on the standing issue.

The Circuit Court did not fail to rule that the defendant's lacked standing. Instead the Circuit Court ruled that the State had waived any challenge to that issue. Yet there is no challenge, or even mention, of the Order Re: Standing in the State's Opening Brief.

Because standing issue was first waived in the Circuit Court and the Circuit Court's ruling as to that waiver is not raised in this appeal, HRAP 28(b), due process and general principles of estoppel preclude substantive review of the standing issue for the first time on appeal.

B. THE COURT DID NOT ERR IN CONCLUDING THAT THERE WAS NO PROBABLE CAUSE TO SUPPORT THE SEARCH WARRANT.

The State asserts on appeal that "the court erred when it found lack of probable cause for the warrant,[7]" yet the State has not challenged a single Finding of Fact that led to the Court's conclusion that there was no remaining probable cause after the false and illegally obtained information was stripped from the affidavits that originally supported the warrant.

In finding that the warrant was unsupported by probably cause, the Circuit Court specifically found, in turn, that each of the three purported factual bases for the warrant were nonexistent or false. The Court specifically found, "The probable cause justification for the search warrant is: 1) the uncorroborated information of the CS; 2) Defendant's statement; and 3) the alert by Simon." *Augustin FOF # 58.* ROA at 91. (ROA Vol. 3 PDF p. 63/148).

Specifically, the Court found as fact:

[7] Opening Brief, p. 12.

- There had been no corroboration of the confidential source[8].

- Simon the dog had not alerted to the subject package[9].

- The defendant's statements were made during custodial interrogation[10].

- The affidavit in support of the search warrant contained numerous misstatements by police[11].

As the Court below correctly observed, "where a search warrant relies on an affidavit of a police officer, and the affidavit is based on information supplied by a confidential informant, the affidavit must set out some underlying circumstances from which the informant can conclude that the contraband was where he/she claims, and must set out some of the underlying circumstances from which the

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[8] See Agustin FOF # 8. " The investigation by KPD Officers failed to produce any evidence whatsoever that either Defendant Sullivan or Defendant Agustin were involved in any illegal activity whatsoever." See also COL #6. "At the time Sergeant Rose approached Defendant Agustin his investigation had failed to produce any evidence that Defendant Agustin was involved in criminal activity." (ROA at PDF Vol 3 p. 55). *Sullivan COL #11*, "As such, there was no probable cause to arrest Sullivan for a narcotic offense."

[9] See *Agustin FOF #56*, "Officer Cayabyab's record keeping is inadequate to establish a correct percentage of accuracy of Simon." *Agustin COL #23*, "Office Cayabyab's intentional omission of Simon's alert response of lying down was a material misstatement of fact in that the alert did not comply with Simon's certification and training." *Sullivan COL #22* "The affidavit of Officer Pia in support of the search warrant application contains material misstatements of fact;" *Sullivan COL #23* "Officer Cayabyab's intentional omission of Simon's final response of lying down next to the package was a material misstatement of fact. See Exhibit D-1. Attachment III." *Sullivan COL #14* "Officer Cayabyab's testimony of there being a positive response lacks credibility."

[10] See *Agustin FOF #53*, "The statement of Defendant Agustin was the result of the unlawful detention, seizure and arrest of Defendant Agustin." See Sullivan COL # 15, "Defendant Sullivan's statement obtained following an illegal arrest must be suppressed."

[11] See *Agustin COL #22* "The affidavit of Officer Pia in support of the search warrant application contains material misstatements of fact." See also: *Agustin FOF #34-37*, concluding that KPD Sargeant Rose misrepresented to the Court how he came to search Agustin's bag.

affiant can conclude that the informant and information is credible or reliable. State v. Davenport, 55 Haw. 90, 516 P.2d 65 (1973)." *See Agustin COL #20*, infra.

Here the Court concluded, that "[T]he information provided by the CS and contained within the affidavit fails to meet the requirements of Davenport." Id. Appellant State of Hawaii does not contest this finding on appeal. Nor does appellant point to anything in the record as to why the Court's well-reasoned finding that the Confidential Source had not been corroborated was wrong.

In the case of appellee Agustin, the Court found there was absolutely no corroboration of the untested CS. In the case of appellee Sullivan, the Court found that the "the only corroboration in the State's case was the toss of the package, which was no more than the informant in Kachanian informing police the flight the suspect would be traveling" and "there is no indication that the package contained contraband." State v. Kachanian, 78 Haw. 475, 896 P.2nd 931 (Haw. App. 1995). *Sullivan COL 11 & 12*, infra.

Moreover, the State passes over that in determining the lack of probable cause, the Circuit Court found two police officers and a police sergeant made false representations in the affidavit in support of the warrant and testified falsely under oath[12].

The State does not contest these findings related to officer credibility on appeal. And the State points to no facts to even suggest that the Court abused its discretion in making these findings related to the credibility of the State's witnesses. See Fisher v. Fisher, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) ("It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact.")

[12] See Agustin FOF/COL, Filed April 10, 2012. Specifically: 1) COL #22, "The affidavit of Officer Pia in support of the search warrant application contains material misstatements of fact;" 2) COL #23, "Officer Cayabyab's intentional omission of Simon's alert response of lying down on April 6, 2010, was a material misstatement of fact … and COL #7 finding that "Sergeant Rose, … conducted a warrantless and unlawful search of his itinerary bag, and while holding [Agustin] by the arm pulled him along the fence line" – rejecting Rose's testimony that "that the zipper on the bag was unzipped and that [Rose] could see the contents of the bag in plain view." See FOF 29, Id. Infra.

(Citations omitted.); State v. Mitchell, 94 Hawai'i 388, 393, 15 P.3d 314, 319 (App.2000) ("The appellate court will neither reconcile conflicting evidence nor interfere with the decision of the trier of fact based on the witnesses' credibility or the weight of the evidence.") (Citations omitted.); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 116-17, 839 P.2d 10, 28 (1992) ("Moreover, '[a]n appellate court will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence; this is the province of the trial judge.' ") (Brackets in original; citations omitted).

As Appellees argued below, 'An affidavit which misstates material facts hinders the judicial officer's inference-drawing powers and increases the likelihood that privacy will be invaded without probable cause.' State v. Sepa, 72 Haw. 141, 144, 808 P.2d 848. (1990). Once it is established that the affidavit contains material misstatements of fact, the Sepa court noted "the reviewing court must determine whether the affidavit's content, with the false material omitted, is sufficient to establish probable cause." Sepa at 144, 808 P.2d at 850. Motion to Suppress. p. 5. ROA Vol. 2, P.45.

Appellant does not point to any flaw in the Court's reasoning when it carefully undertook the Sepa analysis. And Appellant State of Hawaii undertakes no such analysis in this appeal either. It simply contends that the Court erred in not finding probable cause. The State has failed to support this broad assertion.

Indeed the Circuit Court correctly relied on State v. Kachanian, 78 Hawai'i 475, 896 P.2d 931, (1995) in determining that there was no probable cause, after misstatements and false statements were removed from consideration. In Kachanian the Maui police arrested the defendant after they received information from an unnamed source that he was smuggling heroin through the airport, heard defendant deny having possession of drugs, observed the defendant avoid the police from the time he arrived on Maui and saw the defendant discard a package while under surveillance.

As the Court found below, the only evidence properly included in the request for a search warrant that could corroborate the previously untested CS was the

observation of the defendant Sullivan tossing a package over a fence, with no corroboration that the package contained anything illegal.

This alone, fell far short of even what the court had rejected in Kachanian. Thus the Court did not err, especially in the context of the untrustworthy evidence coming from the Kauai police, in suppressing the evidence pursuant to Kachanian.

Accordingly, the State has failed to demonstrate that the Court erred as a matter of law in its determination of probable cause.

C. THE STATE HAS FAILED TO SHOW THAT THE CIRCUIT COURT REVERSIBLY ERRED IN FINDING THAT DEFENDANTS WERE UNDER ARREST BEFORE THE SUBJECT PACKAGE WAS SEARCHED.

The Court found that any incriminating statements the defendants made were the result of unlawful custodial interrogation after arrest. See *Agustin FOF #53*, "The statement of Defendant Agustin was the result of the unlawful detention, seizure and arrest of Defendant Agustin." *See Sullivan COL #15*, "Defendant Sullivan's statement obtained following an illegal arrest must be suppressed." *Sullivan FOF #35*, "Defendants Sullivan and Agustin were arrested prior to the canine screening and prior to the testing of any of the contents of the bag." *Sullivan COL #4*, "The "detention" by police officers of defendants Sullivan and Agustin was an arrest as Defendant was not to leave seizure was not investigatory. State v. Lloyd, 61 Haw. 505, 509, 606 P.3d. 913,916 (1980)."

In its Opening Brief, the State contends that "the defendants were detained long enough to obtain a warrant to search the package" and that "when officers saw Sullivan throw the package over the fence, as had been previously described to Officer Pia by the informant, officers had specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion. "

The State then urges this Court to reverse the Circuit Court's finding that the defendant's alleged statements, based on U.S. v. Attardi, 796 F.2d 257 (9th Cir. 1986). Opening Brief at 20.

But the State does not explain how the Court allegedly erred or point to what impact such an error had, if any. In suggesting that the defendants were not under arrest when they were questioned at the scene of the arrest and at the police station, the State ignores material findings of fact:

> • *Agustin FOF #25*. Sergeant Rose approached the Gas Company base yard and made contact with Defendant Agustin. Sergeant Rose demanded that Defendant Agustin open the secured gate and permit Sergeant Rose entry to the base yard. Defendant Agustin complied with Sergeant Rose's demand and opened the secured gate."
>
> *Agustin FOF #26*. Sergeant Rose immediately entered the Gas Company base yard and grabbed Defendant Agustin by the arm. Defendant Agustin was seized by Sergeant Rose at this point and was not free to leave."
>
> • *Agustin FOF #37*. "… The Court finds that the zippered itinerary bag that Sergeant Rose seized from Defendant Agustin was closed when it was seized by Sergeant Rose. Further that Sergeant Rose struggled with the bag to open it, then unzipped the zipper opening the bag, and then searched the bag. "
>
> • *Agustin FOF #38*. "After searching the bag Sergeant Rose grabbed Defendant Agustin by the arm and led him around the base yard towards the Young Brothers fence line."
>
> • *Agustin FOF #39*. It appeared to Mr. Unciano that Sergeant Rose was pulling Defendant Agustin along the fence line....
>
> • *Agustin COL #7*. Defendant Agustin was seized and arrested when Sergeant Rose, entered his secured workplace, grabbed him by the arm, seized and conducted a warrantless and unlawful search of his itinerary bag, and while holding him by the arm pulled him along the fence line in an attempt to locate the subject package. State v. Lloyd, 61 Haw. 505, 606 P.2d ~13 (1980), Kachanian, Supra
>
> *Agustin COL #8.*. The seizure of Defendant Agustin was not a temporary detainment or investigatory stop

> pursuant to Terry v. Ohio, 392 U.S. 1 (1968), as it clearly exceeded the permissible parameters of a Terry stop or temporary detainment in both the scope of the detainment of Defendant and the scope of the search of Defendant.
>
> • *Sullivan FOF #32.* "Lt. Shibuya took Defendant Sullivan into his custody; Defendant Sullivan was not free to leave. T. 12/1/11, p. 66."
>
> • *Sullivan FOF #35.* "Defendants Sullivan and Agustin were arrested prior to the canine screening and prior to the testing of any of the contents of the bag. T. 12/1/11, pp. 44, 48, 67."
>
> • *Sullivan FOF #33*. "Officer Rose believed that Defendant knew that he was not free to leave. T. 12/1/11, p. 76. ..."
>
> • *Sullivan FOF #48*. "Approximately 20 minutes later [after Sgt. Rose had dragged Agustin to the package and the dog was brought over], Sgt. Rose arrived at the Young Brothers' pier and observed Defendant [Sullivan] in the custody of. Shibuya. T. 12/1/11, pp. 67-68."
>
> • *Sullivan FOF #51*. Officer Rose recalls that he obtained Defendant Sullivan's cell phone when he patted him down in placing him in the police vehicle to be transported to police headquarters. T. 12/11/11, p. 85."
>
> • *Sullivan FOF #52*. Officer Rose obtained Defendant Sullivan's cell phone and saw that there were four texts that went back and forth. T. 12/1/11, p. 51."
>
> • *Sullivan FOF #53*. Officer Rose did not have a search warrant to search Defendant Sullivan's cell phone for text messages. T. 12/1/11, p. 86."

By failing to make specific reference to any of the numerous factual findings the Court made before it concluded defendants were under arrest at the time of the (fictitious) dog alert, the State has not properly submitted the issue for appellate review. Moreover Appellant does not point out the significance of the claimed error. Nor does it claim that the defendants' statements should have been included in the

analysis of what evidence that supported the search warrant. Nor does it claim on appeal that the statements were voluntarily made or that the Court erred in ruling to the contrary. As the Court noted: "Even assuming arguendo that Defendant was not seized or arrested at that time, Defendant Agustin was then placed, within minutes, in the back of a police vehicle. It is unquestioned that he was arrested at that point." *Agustin COL #9*.

And as noted above, the Court also made numerous findings that the officers lied about the facts and circumstances surrounding the arrest. Appellant has not contested those findings, but apparently instead asked this court to second-guess the Court's credibility determinations and reverse its judgment after doing so.

But, "appellate courts will give due deference to the right of the trier of fact 'to determine credibility, weigh the evidence, and draw reasonable inferences from the evidence adduced." State v. Agard, 113 Hawai'i 321, 324, 151 P.3d 802, 805 (Hawai'i,2007) and this Court should do the same.

After the Circuit Court heard enough of police misstatements it plainly concluded that it did not trust the State's evidence in this case. In doing so it found that there was no corroboration of the CS in Mr. Agustin's case and far less than existed in Kachanian in Mr. Sullivan's case.

Appellees respectfully contend that the State has failed to convincingly rehabilitate the State's tainted evidence into that which would support a search warrant.

D. THE CASE WAS PROPERLY DISMISSED WHEN THE STATE APPEARED FOR TRIAL, ADMITTEDLY UNREADY TO PROCEED.

Appellant is correct that Hawai'i Rules of Appellate Procedure Rule 4(b) provides in relevant part:

> Appeals in criminal cases. In a criminal case, whether the appeal is one of right or is an interlocutory appeal, the notice of appeal by a defendant shall be filed in the circuit or district court within 30 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be

> treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 30 days after the entry of an order denying the motion.

Indeed, Appellant's Notice of Appeal was filed within 30 days after the entry of the entry of the Court's order suppressing evidence.

What Appellant misses, however, is the fact that this case was dismissed when Appellant appeared for trial on May 7, 2012, and requested a continuance, which was denied.

Moreover, the transcript from the hearing the State complains about is noticeably absent from the Record on Appeal. Accordingly, the State cannot point to the specifics of where or how the alleged error was committed.

As stated above, HRAP Rule 28(b)(4)(C) mandates that an appellant must specifically set forth where, "the alleged error [was] committed by the court" and provide "either a quotation of the finding or conclusion urged as error or reference…" "Points not presented in accordance with [HRAP Rule 28(b)(4)] will be disregarded." HRAP Rule 28(b)(4) (Emphasis added).

Had Appellant filed its Notice of Appeal prior to the scheduled trial date, there would be no question that the trial court had lost the jurisdiction to dismiss the case. But this was not the case. In this case, the State appeared for trial – and with no prior written notice to the Court or to the defendants, it announced that it was unprepared and sought to continue the case – so that it could file an appeal of the earlier order of suppression.

Generally, a request for continuance is subject to the sound discretion of the trial court, and a grant or denial of continuance will not be disturbed on appeal absent a showing of abuse of that discretion. State v. Lee, 9 Haw.App. 600, 603, 856 P.2d 1279, 1281, reconsideration denied, 9 Haw.App. 660, 861 P.2d 767, cert. denied, 75 Haw. 581, 861 P.2d 735 (1993).

Here, the State does not argue that the Court abused its discretion in denying its untimely and not-properly-noticed request for a continuance. Indeed, the State does

not even argue (or set forth in any standard of review) that the Court abused its discretion in denying the State's last-minute Motion for a Continuance. Indeed, the State does not even allege on appeal that it had good cause to continue the trial.

Although the rules allow for an appeal of the denial of a Motion to Suppress within thirty days, Appellant offers no authority for the proposition that HRAP 4(d) guarantees that even trial dates will be continued to accommodate a party's stated intention to file an appeal on the last possible day.

Appellees contend that the State cannot use a rule that allows it thirty days to appeal an adverse ruling as an entitlement that any trial date scheduled within those thirty days will automatically be continued without notice, by the party wishing to file the appeal.

V. CONCLUSION

For all of the above reasons the State's appeals should be denied.

_____ _____/s/_____

Daniel G. Hempey
Attorney for MICHAEL GLENN SULLIVAN

CAAP-12-0000456

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

STATE OF HAWAII,	)	CAAP-12-0000456
	)	
Plaintiff-Appellee,	)	
	)	CR. NO. 10-1-0153
v.	)	
	)	(Certificate of Service)
MICHAEL GLENN SULLIVAN,	)	
ROLANDO ALEGADO AGUSTIN	)	Circuit Court of the Fifth Circuit
	)	
Defendants-Appellants.	)	Hon. Judge Kathleen N.A. Watanabe
	)	
	)	

(Certificate of Service)

I HEREBY CERTIFY that two (2) copies of the foregoing MICHAEL GLENN SULLIVAN's Answering Brief was duly served upon each of the following attorneys by placing the same in the United States mail, first class postage prepaid, on November 28, 2012:

Charles Foster
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DATED: Lihue, Hawai`i, November 28, 2012

Respectfully submitted:

/s/
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MICHAEL GLENN SULLIVAN