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NO. CAAP-12-0000456

IN THE INTERMEDIATE COURT OF APPEALS  
STATE OF HAWAI'I

STATE OF HAWAI'I,	)	CR. NO. 10-1-0153
	)	
Plaintiff-Appellant,	)	APPEAL OF DEFENDANT MICHAEL
	)	GLENN SULLIVAN'S FINDINGS OF
vs.	)	FACT AND CONCLUSIONS OF LAW
	)	AND ORDER FILED APRIL 10, 2012
MICHAEL GLENN SULLIVAN,	)	
ROLANDO ALEGADO AUGUSTIN,	)	AND
	)	
Defendant-Appellees.	)	APPEAL OF FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND ORDER
	)	SUPPRESSING EVIDENCE AND
	)	STATEMENT OF DEFENDANT
	)	ROLANDO AGUSTIN FILED APRIL 10,
	)	2012
	)	
	)	CIRCUIT COURT OF THE FIFTH
	)	CIRCUIT, STATE OF HAWAI'I
	)	
	)	HONORABLE KATHLEEN N.A.
	)	WATANABE, JUDGE PRESIDING

OPENING BRIEF

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OPENING BRIEF

STATEMENT OF THE CASE

**Summary**

The state appeals from the lower court's granting of a motion to suppress evidence. In this case, an informant told officers that the defendants were involved in shipping illegal drugs from O'ahu to Kaua'i in cars being shipped between the islands on Young Brothers barges. The informant told officers that the informant saw one of the defendants remove drugs from under the seat of a car on a Young Brothers barge and also saw the same defendant place what the informant thought was a bag of money under the seat of another car on a barge. The informant told officers that the informant had seen one of the defendants pass packages of drugs through

the fence that separates the Young Brothers yard on Kaua‘i from the yard of a propane gas company next door. The informant also told officers that the informant saw one of the defendants throw a package of drugs over the fence from the Young Brothers yard into the gas company yard.

During surveillance of the activities of one of the defendants working in the Young Brothers yard, officers were watching one defendant working in the yard when they noticed the other defendant parked on an overlook across the street from the yards. Officers saw the defendant in the yard wave or motion to the defendant parked across from the yard. Officers then watched the defendant disappear into a barge, come out of the barge a few minutes later and climb onto a forklift, drive the forklift along the fence separating the Young Brothers and the gas company yards, and throw a white package over the fence into the gas company yard.

Meanwhile, the other defendant had driven his vehicle down into the gas company yard where the package had been thrown.

Officers detained the two defendants and obtained a detection dog sniff of the package. The detection dog alerted to illegal narcotics in or on the package and the defendants were then arrested and read their Miranda rights. Both defendants waived their rights and made statements. Officers obtained a warrant to search the package in which they found cocaine.

In granting the defendants’ motion to suppress, the lower court suppressed the cocaine in the package and the statements made by the defendants.

### **Facts**

In 2009 and 2010, Officer Ginny Pia of the Kaua‘i Police Department received information from a confidential source. (TR, Aug. 29, 2011, Docket # 53, 45:19-46:6). The confidential source related to Officer Pia that the confidential source was employed at Young

Brothers and had known Sullivan for approximately seven years; that Sullivan had previously worked at Young Brothers on O‘ahu before being transferred to Kaua‘i; that on one occasion in 2009 the confidential source saw Sullivan enter a private vehicle, reach under the driver’s seat, and remove a bag and that the informant saw in the bag a large amount of a white powdery substance, and that Sullivan left the barge with the bag; that on another occasion in 2009, the confidential source saw Sullivan in a private vehicle that was destined for O‘ahu and that after Sullivan exited the vehicle, the confidential source saw a large amount of money under the driver’s seat; that between 2009 and 2010, on numerous occasions, the confidential source saw Sullivan retrieve packages that the confidential source believed to contain illegal narcotics from private vehicles arriving on barges and placing the items into his pants pockets (TR docket # 53, 52:3-56:16); that the confidential source saw Sullivan, after receiving illegal narcotics, go to the fence separating Young Brothers and the gas company and occasionally hand the illegal narcotics to a person known as Rolando on the other side of the fence (TR docket # 53, 120:13-21); and that in March of 2010, the confidential source also saw Sullivan go to the fence separating Young Brothers and the gas company and toss the package over the fence where he believed Rolando would retrieve it (TR docket # 53, 122:3-20).

On March 16, 2010, in order to corroborate what Officer Pia had heard from the confidential source concerning Sullivan, Officer Pia accompanied by another officer conducted surveillance of Sullivan as he worked at the Young Brothers yard. (TR docket # 53, 61:6-62:21; 123:12-14). The officers saw Sullivan operating a hustler, which is a vehicle used to pull trailers. (Docket # 53, 62:11-17). The officers saw Sullivan exit the hustler, go onto a barge and drive out in a white pickup truck belonging to the state DLNR Division of Conservation and Resource Enforcement (DOCARE)( Docket # 53, 65:1-3; 66:24-67:4; 123:19-124:3). Sullivan parked the

truck then got back into the hustler. (Docket # 53, 66:13-17). The officers called the local DOCARE office and arranged to have the vehicle picked up from the yard. (Docket # 53, 124:4-7).

The DOCARE officer drove it to the parking lot at Vidinha Stadium as directed by the officers. (Docket # 53, 124:17-25). The officers called for a KPD K9 unit to sniff the truck to see if drugs were or had been in the truck. (Docket # 53, 66:2-6; 125:8-10). Officer Cayabyab arrived with a K9 detection dog at the stadium parking lot and conducted a sniff test of the truck. (Docket # 53, 125:8-10; TR September 19, 2011, Docket # 54, 44:9-50:9). The dog alerted to the smell of narcotics (Docket # 53, 126:2-13; Docket # 54, 44:9-50:9). No contraband was found in the truck. The officers believed that the dog's alert indicated that drugs had been in the truck. (Docket # 53, 81:12-16; 81:22-82:2; Docket # 54, 44:9-50:9). The DOCARE officer told officer PIA that the truck had not been used for narcotics investigations (Docket # 53, 79:5-19).

On March 23, 2010, the confidential source told Officer Pia that Sullivan had boarded a barge and had gone into one of the vehicles therein and retrieved a package, that Sullivan then drove a truck off the barge and parked it near the Young Brothers office. (Docket # 53, 85:12-17). The confidential source told Officer Pia that when Sullivan got out of the truck, he removed something from his pocket and placed it in the bed of the truck he had taken off the barge. (Docket # 53, 85:18-22).

On April 6, 2010, a number of officers, including Officer Pia, conducted surveillance of Sullivan working in the Young Brothers yard. (Docket # 53, 126:17-24). Officer Pia and another officer positioned themselves on a hill across the street from and overlooking the yard. (Docket # 53, 95:5-96-8). During their surveillance, officers became aware that a black truck was parked above their position on road overlooking the Young Brother yard. (Docket # 53, 128:12-25). One

of the officers drove by the truck, obtained its license plate information and reported that it was registered to Defendant Rolando Agustin and Leah Agustin. (Docket # 53, 129:11-21; TR Dec. 1, 2011, Docket # 56, 35:17-36:17). During their surveillance, officers saw Sullivan wave or make motions up toward the area where the truck was parked. (Docket # 53, 129:3-9; 130:17-23). Officers saw the black truck leave the area above them and then enter the gate to the gas company yard. (Docket # 53, 130:6-13).

After Sullivan waived up toward the truck, officers saw him enter a barge and then come back out of the barge and get onto a forklift. (Docket # 53, 130:17-24; 164:18-166:6). Officers then saw Sullivan drive the forklift along the fence that separates the Young Brothers yard from the next-door gas company yard. (Docket # 53, 130:24-131:6; 167:10-23). As Sullivan drove the forklift along the fence, an officer saw him throw a white package over the fence into the gas company yard. (Docket # 53, 131:1-21; 167:10-23).

Officer Pia then radioed to the surveillance teams to detain Sullivan and Agustin and to recover the item that Sullivan threw over the fence. (Docket # 53, 131:24-132:12; 172:5-174:19). Officer Pia later testified that Sullivan's throwing the object over the fence from the Young Brothers yard into the gas company yard corroborated specific information the confidential source had given her that Sullivan sometimes threw illegal narcotics obtained from cars on barges over the fence and provided specific and articulable facts sufficient to detain Sullivan and Agustin. (Docket # 53, 132:18-134:13).

Upon Officer Pia's radio transmission, KPD Sergeant Rose drove from his position overlooking the gas company yard to the gate of the yard. (Docket # 56, 37:16-22). Officer Rose saw Agustin standing outside of Agustin's black truck inside the gas company yard. (Docket # 56, 38:8-11). The gate was closed and Officer Rose identified himself whereupon Agustin



opened the gate with his key card. (Docket # 56, 38:13-16). Officer Rose informed Agustin that Officer Rose was conducting a narcotics investigation and that Agustin was being detained. (Docket # 56, 38:22-39:1). Officer Rose held Agustin by the arm and the two walked toward where the package had been thrown into the yard. (Docket # 56, 39:2-5).

Sergeant Rose later testified that he believed he had sufficient reasonable suspicion that criminal activity was afoot to justify his detention of Agustin:

[W]e were conducting an illegal drug investigation. The information was that they were transporting cocaine through the barges and they would come over to the Gas Company side where Mr. Agustin would retrieve it. Based on officers' observations of seeing a package being thrown from Young Brothers by Mr. Sullivan, it confirmed all information we had. I think that is not normal behavior, to have a package thrown from Young Brothers over a fence into the Gas Company.

(Docket # 56, 39:20-40:4).

Officer Rose and Agustin walked along the fence until Agustin seemed to indicate with a movement of his head toward a white plastic bag with red writing on it. (Docket # 56, 40:22-41:6). Sergeant Rose retrieved the bag and walked with Agustin back to the gate where Sergeant Rose turned Agustin and the bag over to Officer Pia. (Docket # 56, 41:7-42:18).

A detection dog alerted to the bag. (Docket #53, 134:21-25; Docket #54, 53:15-55:5). Sullivan and Agustin were then arrested.

Q: Do you know when the decision was made to place Mr. Agustin and Mr. Sullivan under Arrest?

[Sergeant Rose]: When the decision was made to officially arrest them was after the K9 alerted.

(Docket # 54, 44:20-23).

[Officer Pia]: That bag that was tossed over was recovered and the K9 sniff was requested. Once the K9 alerted to that bag, at that time, Sullivan and Agustin were placed under arrest.

(Docket # 53, 134:21-24).

Sergeant Rose meanwhile left the gas company yard and went to the Young Brothers yard where Sullivan was detained by another officer. (Docket # 56, 44:16-19). Officer Rose read Sullivan his Miranda rights from a card. (Docket # 56, 45:1-10). At no point did Sullivan indicate that he did not want to speak, and at no point did Sullivan indicate that he wanted an attorney. (Docket # 56:47:22-48:5; 52:18-25). Sullivan indicated that he wished to waive his right to remain silent and waive his right to have an attorney present and to answer Sergeant Rose's questions. (Docket # 56, 48:6-8).

Officer Pia then prepared an affidavit and search warrant to search the package. (Docket # 53, 137:3-4; ROA Vol. 1, p. 20, pdf pp. 118-141). The warrant was signed by District Judge of the Fifth Circuit Trudy Senda that day (April 6, 2010). Officer Pia stated in her affidavit attached to the warrant that between 2009 and 2010 she had been receiving information from a cooperative source that Sullivan was utilizing private vehicles coming from O'ahu to Kaua'i on Young Brothers barges to obtain illegal narcotics shipped from O'ahu. (ROA Vol. 1, pdf p. 130).

- That CS is employed with Young Brothers and has known Sullivan for approximately 7 years.
- That Sullivan previously worked at Young Brothers on O'ahu prior to transferring to Kaua'i.
- That on one occasion in 2009, observed Sullivan enter a private vehicle, reach under the drivers seat and remove a bag. Upon opening the bag, CS observed a large amount of a white powdery substance. Sullivan closed the bag and exited the barge carrying the bag.
- That on another occasion in 2009, he/she has observed Sullivan in a private vehicle which was destined for O'ahu. After Sullivan left this vehicle, CS observed a large amount of money under the driver's seat of the vehicle.
- That between 2009 and 2010, on numerous occasions, he/she has seen Sullivan retrieve packages, which he/she believes to be illegal narcotics from private vehicles arriving on the barge and place the items into his pants pockets.
- ...
- That on the days that Sullivan is expecting illegal narcotics, he/she observes that in the morning Sullivan's pockets on his cargo pants are flat

as nothing is in the pockets. Once Sullivan retrieves the illegal narcotics, he/she observes that Sullivan's pockets are bulging.

- That the barge arrives to Kaua'i on Tuesdays and Fridays. That Sullivan receives shipments approximately 3-4 times a month.
- That he/she has observed Sullivan, after retrieving the illegal narcotics, go to the fence line of the property separating Young Brothers and the Gas Company and occasionally hand the illegal narcotics to a person known as Rolando on the other side of the fence.
- That he/she has also observed Sullivan, after retrieving the illegal narcotics go to the fence line of the property separating Young Brothers and the Gas Company and toss the package over the fence where he believes Rolando would retrieve it.

(ROA Vol , pdf pp. 130-131).

Officer Pia's affidavit further recounted that on March 16, 2010 during Surveillance of Sullivan officers watched him pull a single vehicle out of the barge – the DOCARE vehicle – and park it, that the officers retrieved the vehicle and that a K9 sniff had indicated that illegal narcotics had recently been in the vehicle. (ROA Vol. 1, pdf pp. 131-132). (Due to clerical error, the date of the March 16 occurrence was inadvertently stated to have been March 9, 2010 twice in one paragraph of the affidavit. However it is listed correctly on the previous page where discussion of the occurrence commences. See pdf. pp. 131-132).

Officer Pia's affidavit further relates that she received information from the informant that on March 23, 2010 Sullivan had driven a truck off the barge and after parking it by the fence adjacent to the gas company, placed something from his pocket into the bed of the truck.(Id. at pdf p.132-133). The affidavit further stated that on March 26, 2010, the informant saw Sullivan enter a vehicle on a barge and then emerge from the vehicle with bulging pockets and that the informant then saw Sullivan go to the fence and throw what was in his pocket over the fence into the gas company property. (Id. at. pdf. p. 133).

The affidavit also said that on April 2, 2010, the informant told Officer Pia that Sullivan entered a vehicle being shipped to Kaua'i and that the informant later saw what the informant believed to be money wrapped in a plastic grocery bag under the driver's seat. (Id.).

Officer Pia related in her affidavit the surveillance that occurred that day – April 6, 2010 – and stated that officers saw the black truck parked overlooking Young Brothers, that officers checked the truck's license and determined that it was registered to Rolando Agustin and Leah Lei, that officers saw Sullivan look up at the lookout where Rolando's vehicle was parked and make an arm motion appearing to signal toward the truck, and that officers saw Sullivan utilizing his phone, that shortly thereafter Rolando left the lookout area and drove into the gas company yard, that Sullivan entered the barge, emerged, got on a forklift, drove along the fence between Young Brothers and the gas company, and tossed a package over the fence, that officers recovered the package and that at 7:05 a.m. Officer Pia was informed that a drug detection dog had alerted to an odor of narcotic in or on the bag. (Id. at pdf. pp.133-35).

The affidavit further related that Sergeant Rose had verbally informed Sullivan of his rights and that Sullivan chose to waive his rights and make a statement. The affidavit also related that another officer (Daniel Oliveira) informed Agustin of his rights and that Agustin also waived his rights and made a statement. (Id. at pdf. pp. 135-137).

After obtaining the judge's signature on the warrant, officers recovered 203.5 grams of cocaine from the bag. (Docket # 53, 135:12-21).

### **Proceedings**

On March 8, 2011, Sullivan filed Defendant Michael Glenn Sullivan's Motion to Suppress Evidence in which Sullivan argued that officers lacked probable cause to arrest Sullivan, that statements made by Sullivan to officers were not a result of knowing, intelligent,

and voluntary waiver of his Miranda rights, and that the search warrant for the package Sullivan threw over the fence was not based upon probable cause. (ROA Vol. 2, p. 44, pdf pp. 15-25).

On May 12, 2011, the State filed State of Hawai'i's Memorandum in Opposition to Defendant Michael Glenn Sullivan's Motion to Suppress Evidence Filed March 8, 2011, in which the State argued that Officers had probable cause to arrest Sullivan, that Sullivan's statements were given knowingly and voluntarily and that he never requested counsel, that Sullivan cannot contest the search warrant because he abandoned the bag that was searched by throwing it over the fence and therefore had no reasonable expectation of privacy in it, that the affidavit was sufficient to show the informant was reliable that contraband was inside the bag, that the affidavit did not contain false statements, and that the defendant's motion was untimely pursuant to HRPP Rule 47. (ROA Vol. 2, p. 57, pdf pp. 64-82).

Also on May 12, 2011, Agustin filed Agustin's Joinder in Defendant Sullivan's Motion to Suppress Evidence Filed on March 8, 2011. (ROA Vol. 2, p. 56, pdf pp. 128-29).

On August 26, 2011, Sullivan filed Defendant Michael Glenn Sullivan's Responsive Memorandum in Support of Defendant Michael Glenn Sullivan's Motion to Suppress Evidence Filed March 8, 2011. (ROA Vol. 2, p. 73, pdf. pp. 149-157). On January 6, 2012, Sullivan filed Defendant Michael Glenn Sullivan's Supplemental Memorandum to Defendant Michael Glenn Sullivan's Motion to Suppress Evidence Filed March 8, 2012. (ROA Vol. 2, p. 78, pdf pp. 164-69).

A hearing multi-day was conducted on the motion on

- June 28, 2011 (TR June 28, 2011, Docket # 52; ROA Vol. 2, pdf. P. 224);
- August 29, 2011 (TR Aug. 29, 2011, Docket # 53; ROA Vol. 2, pdf. P. 230);
- September 19, 2011 (TR Sep. 19, 2011, Docket # 54; ROA Vol. 2, pdf. P. 238);

- December 1, 2011 (TR Dec. 1, 2011, Docket # 56; ROA Vol. 2, pdf. P. 248);
- December 2, 2011 (TR Dec. 2, 2011, Docket # 57; ROA Vol. 2, pdf. P. 256);
- January 12, 2012 (TR Jan. 12, 2012, Docket # 58; ROA Vol. 2, pdf. P. 262);
- February 16, 2012 (TR Feb. 16, 2012, Docket # 59; ROA Vol. 2, pdf. P. 273);

At the end of the February 16, 2012 hearing, the court ordered the parties to submit proposed findings of fact, conclusions of laws, and orders. (Docket # 59, 64:9-16). On April 10, 2012, the court filed Defendant Michael Glenn Sullivan’s Findings of Fact and Conclusions of Law and Order granting Sullivan’s motion to suppress and precluding from use at trial any evidence obtained “after Sullivan’s arrest and any evidence obtained from the search of the package.” (ROA Vol. 3, p. 89, pdf. p. 41). Also on April 10, 2012, the court filed Findings of Fact, Conclusions of Law, and Order Suppressing Evidence and Statements of Defendant Rolando Agustin. (ROA Vol. 3, p. 90, pdf. p. 53).

May 7, 2012 was the trial date for the case. On that date, the state told the court that it intended to appeal the orders granting the motion to suppress and asked the court to continue the trial date. (ROA Vol. 3 pdf. p. 145). The court denied the state’s request and instead granted defendants’ oral motion to dismiss the case. (Id.). On May 29, 2012, the state objected in writing to the court’s dismissal in State of Hawai‘i’s Statement of Objection to Defendant’s Form of Order Regarding the Court’s Granting of an Oral Motion to Dismiss Made By Defendants on May 7, 2012.(ROA Vol. 3 p. 95).

#### POINTS OF ERROR

##### **1. The court erred when it failed to rule that neither defendant had a reasonable expectation of privacy in the package searched**

Neither defendant had a reasonable expectation of privacy in the package Sullivan threw over the fence. Therefore, neither defendant enjoyed the ability to invoke the constitutional

protections against unreasonable search and seizure. The state placed the argument that Sullivan lacked any reasonable expectation of privacy in the package he threw over the fence in its State of Hawai'i's Memorandum in Opposition to Defendant Michael Glenn Sullivan's Motion to Suppress Evidence, Filed March 8, which the state filed on May 12, 2011. (ROA Vol. 2, p. 56, pdf pp. 72-74).

The state orally argued the same at the February 16, 2012 hearing date on the motion to suppress:

[N]either one of [the defendant's] have standing to contest probable cause for the warrant. Okay. Mr. Sullivan abandoned the property because he threw it over a secure fence to another area that wasn't accessible to him. So he abandoned it. Mr. Agustin never had a reasonable expectation of privacy in the bag because he never possessed it.

(Docket # 59, 52:5-11).

Neither of the court's final orders on the suppression motion addressed the question of the defendants' reasonable expectations of privacy in the package.

## **2. The Court erred when it found lack of probable cause for the warrant**

The State argued at the February 16, 2012 hearing date on the motion to suppress:

Judge Senda found probable cause, and it's a similar analysis that we just went through in *Kachanian*. And in this case, you've got very specific information from a cooperative source. It's corroborated on two occasions by KPD with the corroboration on April 2<sup>nd</sup> (sic) being very strong corroboration. The corroboration on March 16th, you could almost throw that out, your Honor. I mean, they want to focus on that; but, of course, they want to focus on that because that's the weakest link. But if you look on the corroboration on April 2<sup>nd</sup> (sic), it's a slam dunk. That's not one of his normal activities is to drive along the fence line and throw a bag on the other side, and somebody has been reporting this is how they're smuggling drugs. And I mean it's outrageous to even argue that.

(Docket # 59, 53:10-24)(The state's citation of April 2<sup>nd</sup> is error. The throwing of the bag over the fence occurred on April 6).

In State of Hawai'i's Memorandum in Opposition to Defendant Michael Glenn Sullivan's Motion to Suppress Evidence, Filed March 8, the state argued that the supporting affidavit contained sufficient underlying circumstances from which Pia could conclude that the CS's reports were reliable and credible, and that the supporting affidavit contained sufficient underlying circumstances to show that contraband was inside the bag. ROA Vol. 2, p. 56, pdf. pp. 74-75.

The court Ruled there was lack of probable cause to search the package in Defendant Michael Glenn Sullivan's Findings of Fact and Conclusions of Law and Order, ROA Vol. 3, p. 89, COL 16-26, and Findings of Fact, Conclusions of Law, and Order Suppressing Evidence and Statements of Defendant Rolando Agustin, ROA Vol. 3, p. 90, COL 17-24.

### **3. The Court erred when it found the arrest occurred at time of detention**

The court found that "Defendants Sullivan and Agustin were arrested prior to the canine screening and prior to the testing of any of the contents of the bag." (ROA Vol. 3, p. 89, FOF 35).

The State argued at the February 16, 2012 hearing date on the motion to suppress:

The State just wants to point out that the officers were very careful in this case, and they did not arrest the individuals until they had actually seized the bag, and they didn't look inside the bag. They took it out for a K9 sniff to see if they could get probable cause. Because at that point they didn't think they had probable cause, but they knew they had a reasonable suspicion to detain these individuals. That's the critical distinction as far as arrest. They want arrest to be as soon as they went down there and laid hands on these guys. It's not. It's an investigative detention for a time long enough to either corroborate or dispel, sure, reasonable suspicion, and that's exactly what happened in this case.

(Docket # 59, 54:4-18).



#### **4. The Court erred when it dismissed the case against the defendants**

The Court erred when at the May 7, 2012 trial date, the court denied the state's motion for continuance of the trial date in order for the state to file an appeal, and instead granted defendants' oral motion to dismiss the case.

On May 29, 2012, the state objected in writing to the court's dismissal in State of Hawai'i's Statement of Objection to Defendant's Form of Order Regarding the Court's Granting of an Oral Motion to Dismiss Made By Defendants on May 7, 2012 in which the state argued that pursuant to HRS § 641-13(7), the state has the right to appeal from an order granting a motion for the suppression of evidence, and that the right of appeal extends 30 days after the filing of the order appealed from.(ROA Vol. 3 p. 95).

#### **STANDARD OF REVIEW**

"A trial court's ruling on a motion to suppress evidence is reviewed *de novo* to determine whether the ruling was 'right' or 'wrong.'" *State v. Spillner*, 116 Hawai'i 351, 357, 173 P.3d 498, 504 (2007) (quoting *State v. Kaleohano*, 99 Hawai'i 370, 375, 56 P.3d 138, 143 (2002)).

"The proponent of the motion to suppress has the burden of establishing, by a preponderance of the evidence, that the statements or items sought to be excluded were unlawfully secured and that his or her right to be free from unreasonable searches or seizures was violated under the fourth amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution." *Id.* (citation omitted.)

"The circuit court's conclusions of law underlying its ruling on a motion to suppress are also reviewed *de novo* under the right/wrong standard." *State v. Vinuya*, 96 Hawai'i 472, 480, 32 P.3d 116, 124 (App.2001). The trial court's findings of fact are reviewed under the clearly

erroneous standard and as such “will not be set aside on appeal unless ... determined to be clearly erroneous.” *Id.* (citations omitted).

## ARGUMENT

### **I. The court erred when it failed to rule that neither defendant had a reasonable expectation of privacy in the package searched**

A defendant who seeks to benefit from the protections of the exclusionary rule has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also that his own constitutional rights were violated by the search and seizure challenged. *State v. Scanlan*, 65 Haw. 159, 649 P.2d 737 (1982)(citing *Rakas v. Illinois*, 439 U.S. 128, 133-41, 99 S.Ct. 421, 424-29, 58 L.Ed.2d 387 (1978); *State v. Abordo*, 61 Haw. 117, 120-21, 596 P.2d 773, 775 (1979)). His ability to invoke the constitutional protections against unreasonable search and seizure depends upon whether he had a legitimate expectation of privacy in the invaded place. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 360-61, 88 S.Ct. 507, 516-17, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring); *State v. Abordo, supra*, 61 Haw. at 122, 596 P.2d at 776).

When a defendant “abandons” property, he or she relinquishes any reasonable expectation of privacy so that a warrantless search and seizure by government officials does not violate the Fourth Amendment of the United States Constitution or Article I, Section 7 of the Hawai‘i Constitution. *State v. Kolia*, 116 Hawai‘i 29, 33-34, 169 P.3d 981, 985-86 (Hawai‘i App., 2007)(citing, inter alia, *State v. Ching*, 67 Haw. 107, 110, 678 P.2d 1088, 1092 (1984)). One has no standing to complain of a search of property he has voluntarily abandoned.” *State v. Mahone*, 67 Haw. 644, 648, 701 P.2d 171, 175 (1985)(citing *Abel v. United States*, 362 U.S. 217, 240-241, 80 S.Ct. 683, 697-698, 4 L.Ed. 668 (1960). “The issue is not abandonment in the strict property right sense, but rather, whether the defendant in leaving the property has relinquished

her reasonable expectation of privacy so that the search and seizure is valid.” *Kolia*, 116 Hawai‘i at 33-34, 169 P.3d at 985-86 (citation omitted).

In ascertaining whether an individual has a reasonable expectation of privacy, the Hawai‘i Supreme Court utilizes a two-part test. *Id.* (citing *State v. Taua*, 98 Hawai‘i 426, 436, 49 P.3d 1227, 1237 (2002); *Katz v. United States*, 389 U.S. 347, 360–61, 88 S.Ct. 507, 516–17, 19 L.Ed.2d 576 (1967)). First, the defendant must exhibit an actual subjective expectation of privacy, and second, that expectation must be one that society would recognize as objectively reasonable. *Id.* (citations omitted). A legitimate expectation of privacy by definition means more than a subjective expectation of not being discovered. *Id.* (citing *State v. Abordo*, 61 Haw. 117, 122, 596 P.2d 773, 776 (1979)).

A defendant had no subjective expectation of privacy where the defendant, while pursued by police, threw a fanny pack containing drugs and paraphernalia onto a building’s roof, even though the defendant argued that “his deliberate placement of his fanny pack in a physically inaccessible area on private property is indicative of an intent to preserve the item for safekeeping, rather than abandoning it.” *Kolia*, 116 Hawai‘i at 35, 169 P.3d at 987. The *Kolia* court noted that the roof was on private property at a place where the defendant neither lived nor worked, and was inaccessible except to those with the means and the right to gain access, and that the defendant would therefore have been unable to retrieve the evidence without both the permission and the proper means to retrieve it. 116 Hawai‘i at 36, 169 P.3d at 988.

Moreover, the expectation of privacy expressed by the defendant was not one that society would recognize as legitimate and reasonable. *Id.* The *Kolia* court noted that more than a subjective expectation of not being discovered was required, and that neither the nature of the place he threw the fanny pack nor his asserted interest in the area searched, nor his precautions to

insure his privacy demonstrated that he had a reasonable expectation of privacy in the pack or its contents. *Id.*

In this case, Sullivan drove a forklift along the fence separating Young Brothers from the gas company yard. He threw the package over the fence from the Young Brothers' side into the gas company side. The gas company yard is secured with a gate and Sullivan does not claim to have had access to it. As in *Kolia*, Sullivan distanced himself from the item such that he failed to exhibit any subjective expectation of privacy in it. And, as in *Kolia*, any expectation of privacy Sullivan might have harbored was nevertheless not one that would be recognized by society. Sullivan abandoned the property and therefore cannot assert constitutional protections.

Agustin never had possession of the package and therefore could never enjoy any constitutional protections regarding its search.

This court should therefore vacate the lower court's orders suppressing evidence of the package in Defendant Michael Glenn Sullivan's Findings of Fact and Conclusions of Law and Order (ROA Vol. 3 p. 89) and Findings of Fact, Conclusions of Law, and Order Suppressing Evidence and Statements of Defendant Rolando Agustin (ROA Vol. 3 p. 90).

## **II. The Court erred when it found lack of probable cause for the warrant**

It is the State's position as argued in section I above that neither defendant had a reasonable expectation of privacy in the package once it was thrown over the fence into the gas company yard and that neither defendant therefore could complain of the search of the package. As the state argued below, in the alternative, the state had sufficient probable cause for the warrant to issue.

The court found a lack of probable cause for the search of the package because of "the lack of underlying circumstances to conclude the narcotics were where the CS claimed they were

and the lack of circumstances from which Officer Pia could conclude that the informant was “credible” and information “reliable.”” (ROA Vol. 3 p. 89, COL 20).

“An affidavit supporting an application for a search warrant can be based on hearsay and the name of the informant need not be revealed.” *State v. Sherlock*, 70 Haw. 271, 273, 768 P.2d 1290, 1292 (1989)(citing *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969)). “The magistrate is entitled to look to the underlying circumstances, including those portions of the information independently verified by police, and to other factors supporting the probable truthfulness of the information.” *Id.* (citing, *United States v. Wong*, 470 F.2d 129, 131 (9th Cir.1972)). In *Sherlock*, police conducted a controlled purchase based on the confidential informant’s information and thereby sufficiently corroborated the informant’s information.

“Corroboration by the law enforcement officer of ... various details in the informer's report could properly support the magistrate's conclusion that the informer was truthful.” *Id.* (citing, *United States v. Dauphinee*, 538 F.2d 1, 4 (1st Cir.1976)). The *Sherlock* court stated:

In *State v. Yaw*, *supra*, this court held that police surveillance which verified information provided by the informant supported a finding that the informant was reliable. In *State v. Nakachi*, 7 Haw.App. 28, 742 P.2d 388 (1987), our Intermediate Court of Appeals determined that the police were reasonable in acting upon information reported by an anonymous caller since some of the information was verified by direct police observation. (Although *Nakachi* involved a warrantless search, the standard for determining probable cause is the same.)

70 Haw. at 274, 768 P.2d at 1292.

In this case, the informant told Officer Pia that the confidential source was employed at Young Brothers and had known Sullivan for approximately seven years; that Sullivan had previously worked at Young Brothers on O‘ahu before being transferred to Kaua‘i; that on one occasion in 2009 the confidential source saw Sullivan enter a private vehicle, reach under the

driver's seat, and remove a bag and that the informant saw in the bag a large amount of a white powdery substance, and that Sullivan left the barge with the bag; that on another occasion in 2009, the confidential source saw Sullivan in a private vehicle that was destined for O'ahu and that after Sullivan exited the vehicle, the confidential source saw a large amount of money under the driver's seat; that between 2009 and 2010, on numerous occasions, the confidential source saw Sullivan retrieve packages that the confidential source believed to contain illegal narcotics from private vehicles arriving on barges and placing the items into his pants pockets (TR docket # 53, 52:3-56:16); that the confidential source saw Sullivan, after receiving illegal narcotics, go to the fence separating Young Brothers and the gas company and occasionally hand the illegal narcotics to a person known as Rolando on the other side of the fence (TR docket # 53, 120:13-21); and that in March of 2010, the confidential source also saw Sullivan go to the fence separating Young Brothers and the gas company and toss the package over the fence where he believed Rolando would retrieve it (TR docket # 53, 122:3-20).

On April 6, 2010, officers watched Sullivan go into a barge, come out, get on a forklift, drive along the fence between Young Brothers and throw a white package over the fence into the gas company yard. Meanwhile, Agustin was noted first on a lookout above the two yards where Sullivan was seen to waive or signal to him and to appear to be texting him, and later in the gas company yard itself where, of course, the package had been thrown.

These facts constitute corroboration by the law enforcement officers of various details in the informer's report to properly support the magistrate's conclusion that the informer was truthful. This court should therefore vacate the lower court's ruling that probable cause did not exist for the warrant.

### III. The court erred when it found the arrest occurred at the time of detention

“A law enforcement officer may ‘in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.’” *State v. Ward*, 62 Haw. 459, 461, 617 P.2d 565, 566 (1980) (per curiam) (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)).

To justify an investigative stop, short of arrest based on probable cause, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The ultimate test in these situations must be whether from these facts, measured by an objective standard, a man of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate.

*State v. Bohannon*, 102 Hawai‘i 228, 237, 74 P.3d 980, 989 (2003) (citations, brackets and quotation marks omitted). We consider the “totality of the circumstances” in determining whether reasonable suspicion supported a stop. *See State v. Spillner*, 116 Hawai‘i 351, 357, 173 P.3d 498, 504 (2007).

The Ninth Circuit Court of appeals upheld as proper a detention where defendants were stopped at Maui Airport as they stepped off a plane from San Francisco by a DEA agent, were led to a small office and their luggage collected, and a sniff of their bags by a detection dog led to the reasonable belief that their luggage contained prohibited drugs. *U.S. v. Attardi*, 796 F.2d 257 (9<sup>th</sup> Cir. 1986). A warrant was procured, and a search then led to the discovery of contraband. *Id.*

In this case, as in *Attardi*, the defendants were detained long enough to obtain a warrant to search the package. Also, as discussed in section III. above, 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. Under the facts in this case, measured by an

objective standard, a person of reasonable caution would be warranted in believing that criminal activity was afoot and that the action taken was appropriate. Therefore, this court should vacate the lower court's ruling that the defendants were illegally arrested rather than legally detained when officers detained them while obtaining the search warrant to search the package.

**IV. The Court erred when it dismissed the case against the defendants**

Pursuant to HRS § 641-13(7), the state has the right to appeal from an order granting a motion for the suppression of evidence, and that the right of appeal extends 30 days after the filing of the order appealed from. In this case, the state informed the court below that the state intended to appeal the court's granting of the motion to dismiss. Nevertheless, upon oral motion by the defendants' the court dismissed the case. This court should vacate the lower court's dismissal of this case.

**CONCLUSION**

The state respectfully asks this court to vacate the lower court's orders suppressing the evidence in this case, and to vacate the lower court's dismissals of the case.

DATED: Līhu'e, Hawai'i, October 9, 2012.

/s/ Charles A. Foster  
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## STATEMENT OF RELATED CASES

No other cases are deemed related.