NO. 22154

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

JOAQUIN AYRES, JR., Defendant-Appellant

APPEAL FROM THE FIFTH CIRCUIT COURT
(CR. NO. 98-0059)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Following a fifth circuit court jury trial, defendant-appellant Joaquin Ayres, Jr. (Defendant) was convicted of the following offenses: (1) Place to Keep Loaded Firearm (Count I) and Place to Keep Ammunition (Count II), in violation of Hawai'i Revised Statutes (HRS) §§ 134-6(c) and 134-6(e) (Supp. 1998);[1] and (2) Delinquent Automobile Tax (Count IV[2]), in violation of HRS § 249-11 (Supp. 1998).[3] Defendant was sentenced to concurrent indeterminate maximum terms of ten years of

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[1] See infra at 19.

[2] Although charged with Racing on Highways (Count III), in violation of HRS § 291C-103 (1993), Defendant was acquitted of that charge.

[3] HRS § 249-11 is entitled "Fraudulent use of plates, tags, or emblems and other misdemeanors; penalties."

imprisonment for Count I and five years for Count II. Defendant was also sentenced to pay a fine of $50.00 for Count IV, which was later waived due to his inability to pay. The trial court entered judgment of conviction and sentence on December 7, 1998.

On appeal, Defendant raises the following points of error: (1) Defendant was denied effective assistance of trial counsel because his counsel, Thomas Medieros, (a) failed to file a motion to suppress illegally seized evidence, and (b) failed to request proper jury instructions; (2) the trial court committed plain error by failing to correctly instruct the jury that HRS § 134-6(c) does not apply to licensed hunters and target shooters going to and from the place of hunting or target shooting; (3) there was no substantial evidence to support Defendant's convictions of Counts I and II; and (4) the trial court committed plain error by depriving Defendant of his constitutional right to presentence allocution.

We agree with Defendant that he was denied effective assistance of counsel and, therefore, vacate the judgment of conviction and sentence and remand for new trial consistent with this opinion. In order to provide guidance on remand, we address Defendant's remaining points of error.

I. BACKGROUND

In the early morning hours of March 31, 1998, Defendant returned home from a hunting trip with his father. After dropping his father off at home, Defendant was stopped by a police officer investigating a possible traffic violation. The

officer found a rifle and ammunition in Defendant's truck, seized the items, and arrested Defendant.

During the prosecution's case-in-chief, Kauaʻi Police Department (KPD) Officer Borengasser testified to the following:

At or about 1:30 a.m. on March 31, 1998, Officer Borengasser was working as acting sergeant at the Līhuʻe police station. The door to his office was open to the parking lot. His office was located at the back end of the building. As he sat at his desk, he heard a vehicle pass by the front of the building. The vehicle caught his attention because of its distinctive engine noise. Shortly thereafter, he heard the sound of a vehicle "burning rubber" coming from the front of the station. Officer Borengasser testified that he associated this sound with a possible traffic violation, excessive speed or a speed contest, in violation of HRS § 291C-103(a) (1993).[4] When he went outside, he could not see any vehicle. He then drove down Hardy Street in an attempt to locate the vehicle and checked the surrounding area of Līhuʻe.

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[4] HRS § 291C-103 provides, in relevant part, as follows:

> **Racing on highways.** (a) Except as provided in 291C-149, no person shall drive any vehicle in any race, speed competition or contest, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration, or for the purpose of making a speed record, and no person shall in any manner participate in any race, competition, contest, test, or exhibition prohibited by this section.
> . . . .
> (d) "Exhibition of speed or acceleration" means the sudden acceleration of a vehicle resulting in the screeching of the vehicle's tires which is done to intentionally draw the attention of persons present toward the vehicle.

When Officer Borengasser reached the bottom of Nāwiliwili Street, he saw Defendant getting out of his truck in front of his home. He recognized Defendant and his truck, but did not investigate whether Defendant had made the noises he heard. Officer Borengasser continued to check the area and then returned to the station.

At approximately 2:15 a.m., Officer Borengasser was standing outside his office when he heard what he believed to be the same distinctive engine sound. He walked to the front end of the parking lot, but was unable to identify the source of the sound. As he walked by his car, Officer Borengasser heard dispatch on the radio say that the car that was burning rubber in front of the station was near its location. Dispatch was located near the back side of the Big Save Supermarket, and Officer Borengasser could see the supermarket from his position. He saw headlights flash in that area and went to investigate; however, the vehicle was gone when he arrived. Other officers assisted Officer Borengasser in looking for the vehicle, but were unsuccessful.

At approximately 3:45 a.m., Officer Borengasser again heard the engine sound while at the station. He turned to Officer Shadron, who was also in the station, and told him, "[T]hat's the sound." When the officers walked outside of the station, they saw Defendant's truck pass by the station and stop at a stop sign near a school. The driver revved the engine,

caused the tires to "burn rubber," and then proceeded down Hardy Street. Officer Borengasser instructed Officer Shadron to follow the truck while he took a different route to try to cut it off.

Officer Borengasser saw the truck coming in the opposite direction and pulled to the side in order to make a u-turn. As Defendant drove by, they both looked at each other, and Defendant immediately pulled into a nearby parking lot. Officer Borengasser pulled into the parking lot behind Defendant.

Officer Borengasser testified that the reason he stopped Defendant was to investigate the possible traffic violation and find out whether Defendant was having problems with his truck, justifying the "burning rubber," or whether Defendant had done so intentionally. Officer Borengasser, however, did not testify as to whether any other motorists or pedestrians were actually in the area.

As Officer Borengasser turned on his lights to illuminate the truck, Defendant got out of his truck and put his hands up. Officer Borengasser approached Defendant and asked him for his driver's license, proof of insurance, and vehicle registration. Defendant replied that he did not have the documents, put his hands behind his back, and said, "[Y]ou might as well arrest me." Although Officer Borengasser admitted that "I didn't know what I had at that point," he handcuffed Defendant and took him into custody to determine what he was "dealing with."

After placing Defendant in the police car, Officer Borengasser walked to the truck to turn off the engine. As he looked into the truck, Officer Borengasser saw the rifle. The rifle was on the front bench seat of the truck and was not in a case. Officer Borengasser observed that the safety switch was on the "fire" position, with a loaded box clip in the rifle and a round in the chamber. He retrieved the rifle and a "banana clip" on the seat near the rifle. He did not conduct a search of the vehicle after finding the rifle and the box clip because he did not feel it was warranted. Officer Borengasser then locked the truck and left it in the parking lot. Officer Borengasser did not see either a rifle case or a backpack in the truck.

A representative from the motor vehicle section of the Department of Finance, Verna Takasi, testified that, pursuant to a request by the prosecutor's office, she researched whether Defendant had paid the taxes on his truck. She discovered that the taxes were not paid, and the truck was not registered.

Officer Oliver, a KPD firearms expert, testified that the rifle was operable. He also testified that one of the two types of ammunition found in the truck was legally used for both hunting and target shooting, but the other type was legally used only for target shooting.

The defense called two witnesses, Defendant's father, Joaquin Ayres, Sr. (Father), and KPD Officer Shadron. The following evidence was adduced from Father's trial testimony:

Father is a lifelong hunter and practices target shooting. Although licensed at one time, Father did not have a hunting license at the time of Defendant's arrest. Father taught Defendant about the care and use of firearms, emphasizing that the firearm and ammunition should be kept separate. Father testified that he always removed the clip and ensured that no bullets were in the chamber before storing the rifle in a soft camouflage-covered carrying case. The rifle would not fit into the case with the clip attached. Father was the owner of the AR-15 rifle found in Defendant's truck.

According to Father, he and Defendant got up early on March 30, 1998 to go hunting. After some target practice, they proceeded to their hunting area on the McBride property in Kalāheo. During the ride, the rifle was kept in a soft camouflage-colored carrying case. The clips and ammunition were in Father's backpack. They remained at the hunting spot until about 1:00 a.m. on March 31, 1998. Upon deciding to return home, Father walked back to the truck, unloaded the rifle, put the rifle back into the carrying case, and placed the rifle behind him in the passenger seat of the truck. At that point, all the bullets in the clips had been used, and the only ammunition in the truck was a box of rounds in Father's backpack.

The ride from the hunting area to the Ayres' home on Rice Street, where Defendant lived with Father, took approximately forty to forty-five minutes. According to Father,

the rifle was still behind the passenger seat when they arrived home. Father began walking downstairs to the home when he remembered that he had left his gun in the truck. When he went outside to get the rifle, Father saw Defendant driving away.

Officer Shadron testified to the following:

When Officer Shadron arrived at the parking lot location, Officer Borengasser had already taken Defendant into custody. Officer Shadron testified that, when he looked into the truck, he saw ten to fifteen loose bullets strewn about the cab of the truck. He seized the loose bullets but could not recall what he did with them. Officer Shadron testified that he seized the bullets after Officer Borengasser had removed the rifle and clips, but the record does not reflect how he got into the truck to seize the bullets. Officer Shadron then returned to the station and booked Defendant.

At the conclusion of the trial, defense counsel did not submit any jury instructions and agreed to the instructions requested by the prosecutor and given by the court.

The jury found Defendant guilty of Count I (place to keep a loaded firearm), Count II (place to keep ammunition), and Count IV (failure to pay automobile tax). The jury returned a verdict of not guilty as to Count III (racing on highways).

The trial court sentenced Defendant to the maximum allowable sentences for Counts I and II: concurrent indeterminate terms of ten years of incarceration for Count I and

five years for Count II. Defendant was also sentenced to pay a fine of $50.00 for Count IV, which was later waived due to his inability to pay.

Defendant's timely appeal followed.

II. DISCUSSION

A. Ineffective Assistance of Counsel

Defendant claims that he was denied effective assistance of trial counsel because Mr. Medeiros failed to: (1) file a motion to suppress evidence and (2) request proper jury instructions.

Defendant may raise, for the first time on appeal, the claim that he was denied effective assistance of counsel. See State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993). Defendant's right to effective assistance of counsel is guaranteed by article I, section 14 of the Hawai‘i Constitution (1978).[5] When an ineffective assistance of counsel claim is raised, the question is: "When viewed as a whole, was the assistance provided to the defendant within the range of competence demanded of attorneys in criminal cases?" State v. Fukusaku, 85 Hawai‘i 462, 479-80, 946 P.2d 32, 49-50 (1997) (citation omitted). The defendant has the burden of establishing: "1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and

[5] Article I, section 14 of the Hawai‘i Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for the accused's defense."

2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id. (citations omitted).

In applying the test,

> [s]pecific action or omissions alleged to be error but which had an obvious tactical basis for benefitting the defendant's case will not be subject to further scrutiny. If, however, the action or omission had no obvious basis for benefitting the defendant's case and it resulted in the withdrawal or substantial impairment of a potentially meritorious defense, then [it] . . . will be evaluated as . . . information that . . . an ordinary competent criminal attorney should have had.

Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (emphasis, ellipses, and brackets in original) (citing Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993)).

In addition, "[d]etermining whether a defense is 'potentially meritorious' requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker . . . . Accordingly, no showing of 'actual' prejudice is required to prove ineffective assistance of counsel." Dan, 76 Hawai'i at 427, 879 P.2d at 532 (citations omitted).

Defendant contends that Mr. Medeiros's failure to file a motion to suppress illegally seized evidence resulted in the withdrawal of a potentially meritorious defense. Defendant argues that his convictions of Count I and II were based on evidence, specifically the rifle and ammunition, illegally seized pursuant to an invalid stop and a warrantless search.

Defendant argues that the initial stop made by Officer Borengasser and his arrest of Defendant prior to the "viewing" of

the rifle in the truck were suspect and that a motion to suppress should have been filed, specifically putting at issue the basis for Officer Borengasser's stop and arrest. As previously stated, Officer Borengasser testified that, while investigating engine sounds that he heard from inside the police station and that he associated with excessive speed or a speed contest, he saw Defendant stop at a stop sign and rev his engine, causing Defendant's tires to "burn rubber." He stopped Defendant in order to investigate whether Defendant was having problems with his truck, justifying the "burning rubber." The stop occurred at 3:45 a.m. and Officer Borengasser did not testify regarding whether any other motorists or pedestrians were in the area. Officer Borengasser further testified that he did not know "what he had" when Defendant pulled into the parking lot.

"[A]n investigative stop can be justified based on an objectively reasonable suspicion of any offense, provided that the offense for which reasonable suspicion exists is related to the offense articulated by the officer involved." State v. Bolosan, 78 Hawai'i 86, 94, 890 P.2d 673, 681 (1995), overruled on other grounds by State v. Vallesteros, 84 Hawai'i 295, 933 P.2d 632, reconsideration denied, 84 Hawai'i 295, 933 P.2d 632 (1997) (holding that police may order individuals out of vehicles for traffic-related criminal offenses). In Bolosan, this court held that the officer's subjective suspicion that the defendant had committed an illegal exhibition of speed was not objectively

reasonable. Id. However, this court concluded that the officer's observations of noise and smoke coming from the car could have provided an objectively reasonable suspicion that the defendant had violated a muffler ordinance. Id.

The officer's justification for the stop in Bolosan was similar to Officer Borengasser's stated reasons for the stop in this case. In Bolosan, the officer saw defendant's car stopped at a stop sign. He heard the defendant's engine revving loudly and saw a plume of heavy exhaust. When the light turned green, the defendant drove through the intersection toward the officer's position. The defendant did not screech the tires and did not travel at a high speed. The officer did not notice any other cars nearby and he could not remember if there had been other people on the street, sidewalk, or in the neighborhood. Based on his observations, the officer believed that the defendant had committed the offense of exhibition of speed, in violation of HRS § 291C-103.[6] After concluding that the officer's observations did not support an objectively reasonable suspicion that the defendant had committed the offense of exhibition of speed, the court remanded the case for a determination whether the officer's observations could have supported an objectively reasonable suspicion that the defendant had violated a muffler ordinance. Bolosan, 78 Hawai‘i at 95, 890 P.2d at 682.

[6] See supra note 4.

The facts of the instant case are strikingly similar to Bolosan, except that Officer Borengasser's testimony does not provide any alternative reasons that would justify a stop for an offense other than exhibition of speed. Thus, Officer Borengasser's justification for stopping Defendant may not have been objectively reasonable. Pursuant to Bolosan, a motion to suppress the evidence seized by Officer Borengasser based on an alleged invalid stop might have been successful.

Defendant also argues that Officer Borengasser lacked probable cause to physically arrest him by handcuffing him and placing him into the police car prior to "viewing" the rifle.

> HRS § 803-5[(1993)[7]] authorizes a police officer to arrest a person without a warrant if the officer has probable cause to believe the individual has committed an "offense." HRS § 803-6(b) allows the issuance of a citation in lieu of arrest "in any case in which it is lawful for a police officer to arrest a person without a warrant for a misdemeanor, petty misdemeanor or violation. . . ." Therefore, this discretion to arrest or issue a citation exists only in those situations where an officer is not statutorily precluded from arresting someone for non-felony criminal offenses and violations.

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[7] HRS § 803-5 provides:

> **By police officer without warrant.** (a) A police officer or other officer of justice, may, without warrant, arrest and detain for examination any person when the officer has probable cause to believe that such person has committed any offense, whether in the officer's presence or otherwise.
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> (b) For purposes of this section, a police officer has probable cause to make an arrest when the facts and circumstances within the officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that a crime has been or is being committed.

Vallesteros, 84 Hawai'i at 303, 933 P.2d at 640 (footnote omitted) (emphasis in original). Further, in Vallesteros, we held

> that police officers have the authority to order alleged violators out of their vehicles in the case of traffic-related criminal offenses, but not in the case of traffic violations or when statutorily required to issue a citation. For example, an officer may order a driver out of his car for [driving without a license], but not for failing to have a license in his possession[.]

Id. (emphasis in original). Here, although Defendant voluntarily exited his vehicle, Officer Borengasser physically arrested him after Defendant admitted he could not produce his driver's license, vehicle registration, or proof of insurance. At that point, Officer Borengasser did not take any steps to determine whether Defendant was, in fact, licensed or whether the vehicle was properly registered. Thus, Officer Borengasser may have lacked probable cause to arrest Defendant.[8] Officer Borengasser's viewing of the rifle and ammunition occurred only after Defendant was placed into the police car. The "fruit of the poisonous tree" doctrine "prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act of the police." Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997) (citing State v. Medeiros, 4 Haw. App. 248, 251 n.4, 665 P.2d 181, 184 n.4 (1983)). Accordingly, a

[8] Although Defendant was initially charged with driving without a license, it appears that this charge was dropped inasmuch as no evidence was adduced regarding this charge, the jury was not instructed as to this charge, and no judgment was entered.

motion to suppress evidence seized after an invalid arrest of Defendant may have been successful as well.

Based on the foregoing, we hold that Mr. Medeiros's failure to file a motion to suppress resulted in the withdrawal of a potentially meritorious defense because a successful motion to suppress would have deprived the prosecution of evidence necessary to convict Defendant of Counts I and II. In addition, evidence of the delinquent automobile tax was discovered after the stop of Defendant. Thus, a successful motion to suppress evidence seized pursuant to an invalid stop of Defendant may also deprive the prosecution of evidence necessary to convict Defendant of Count IV.

Generally, in an ineffective assistance of counsel claim, "[i]f the record is unclear or void as to the basis for counsel's actions, counsel shall be given the opportunity to explain his or her actions in an appropriate proceeding before the trial court judge." Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 977 (1993) (citation omitted). The record, however, provides no justifiable basis for Mr. Medeiros's omission, nor is there any indication that giving him the opportunity to explain his actions would result in a denial of Defendant's claim of ineffective assistance of counsel. The record suggests that, despite Defendant's efforts to participate in the case, Mr. Medeiros failed to keep in contact with him and keep him properly informed of the proceedings. On August 10, 1998, the day before

trial, the circuit court issued a bench warrant for Defendant's arrest for "Contempt of Court for Failure to Keep in Touch with Defense Attorney." It appears that the issuance of the warrant was based on Mr. Medeiros's representation to the court that he had not been able to contact Defendant since August 3, 1998.[9] However, before trial commenced on August 11, 1998, Defendant stated to the court that he went to Mr. Medeiros's office on August 7, 1998, but Mr. Medeiros was too busy to see him, and no one informed him of the trial date until he was arrested. Upon questioning by the court, Mr. Medeiros admitted that Defendant had been very conscientious and had assisted him greatly with trial preparation. The court then questioned Mr. Medeiros about possible misrepresentations to the court regarding his contact with Defendant, but declined to address the issue until after trial, stating "if the [c]ourt feels it's necessary, the [c]ourt will report you to the Disciplinary Counsel for not telling the truth to the [c]ourt." The court "canceled" the bench warrant and released Defendant.[10]

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[9] The record contains a declaration by Mr. Medeiros in which he claims he had been unable to contact Defendant since August 3, 1998. Mr. Medeiros's declaration was signed on August 10, 1998 but filed on August 11, 1998. The record does not include any other evidence as to the reasons why the court issued the warrant on August 10, 1998.

[10] The record does not show what, if any, disciplinary action was taken by the court regarding the foregoing possible misrepresentations. However, after trial, the court charged Mr. Medeiros with contempt for failing to appear at a sentencing hearing and issued a bench warrant for counsel's arrest. In addition, when the public defender's office took over Defendant's appeal, it filed a motion to extend time to file its opening brief in which it asserted that it was having difficulty collecting files from Mr. Medeiros, who was now living in Oregon and was no longer practicing law in Hawai‘i due to disciplinary proceedings brought against him. Whether the disciplinary proceedings were brought in connection with his representation of Defendant in

Based on the foregoing, we hold that the assistance provided to Defendant was not within the range of competence demanded of attorneys in criminal cases, and, therefore, Defendant was denied effective assistance of counsel in this case. In light of our holding regarding defense counsel's failure to file a motion to suppress evidence, we need not address whether defense counsel's alleged failure to request proper jury instructions constituted an error or omission resulting in the withdrawal or impairment of a potentially meritorious defense. However, in order to provide guidance on remand, we address whether the jury instructions were proper.

B. Jury Instructions

Defendant contends that the circuit court committed plain error warranting reversal by failing to instruct the jury that HRS § 134-6(c) does not apply to licensed hunters or target shooters going to and from the place of hunting as provided in HRS § 134-5. We agree that the circuit court erred in instructing the jury, albeit on different grounds than those submitted by Defendant.

1. HRS §§ 134-6(c) and 134-5

The interpretation of a statute is a question of law reviewable de novo. State v. Cabrera, 90 Hawai‘i 359, 365, 978 P.2d 797, 803 (1999) (citing, inter alia, State v. Arceo, 84 Hawai‘i 1, 10, 928 P.2d 843, 852 (1996); Gray v. Administrative

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this case is not clear from the record.

Director of the Court, 84 Hawai‘i 138, 144, 931 P.2d 580, 586 (1997)). Our statutory construction is guided by established rules:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
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> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
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> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning." HRS § 1-15(2) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

Cabrera, 90 Hawai‘i at 365-66, 978 P.2d at 803 (some citations omitted) (brackets and quotation marks in original).

Furthermore, in construing criminal statutes, we have acknowledged that, where an exception to an offense is "an integral part of the verbal description of the offense, the burden is on the prosecution to negative that exception, prima facie, as part of its main case." State v. Jenkins, 93 Hawai‘i 87, 107, 997 P.2d 13, 33 (2000) (citing State v. Lee, 90 Hawai‘i 130, 137-38, 976 P.2d 444, 451-52, reconsideration denied, 90 Hawai‘i 130, 976 P.2d 444 (1999)). However, "when the facts hypothesized in the exceptive provision are peculiarly within the knowledge of the defendant, or the evidence concerning them is

within [the defendant's] private control[,]" the burden shifts to the defendant. Jenkins, 93 Hawai'i at 107, 997 P.2d at 33 (citing State v. Nobriga, 10 Haw. App. 353, 358, 873 P.2d 110, 113 (1994), overruled on other grounds by State v. Maelega, 80 Hawai'i 172, 178-79, 907 P.2d 758, 764-65 (1995)).

HRS § 134-6 provides, in relevant part, as follows:

> (c) Except as provided in sections 134-5 and 134-9[11], all firearms and ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms or ammunition or both in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following: a place of repair; a target range; a licensed dealer's place of business; an organized, scheduled firearms show or exhibit; a place of formal hunter or firearm use training or instruction; or a police station. "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.
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> . . . .
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> (e) . . . Any person violating this section by carrying or possessing a loaded firearm or by carrying or possessing a loaded or unloaded pistol or revolver without a license issued as provided in section 134-9 shall be guilty of a class B felony. Any person violating this section by carrying or possessing an unloaded firearm, other than a pistol or revolver, shall be guilty of a class C felony.

(Emphases added.) Subsection (c) governs the "place to keep firearms" lawfully possessed, requiring that they be "confined to the possessor's place of business, residence or sojourn." It also provides an exception allowing for lawful transport of firearms being carried between the listed places of lawful possession and use if, and only if, they are kept in the manner described: unloaded and in an enclosed container.

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[11] HRS § 134-9 (Supp. 1998) provides for licenses to carry a firearm.

HRS § 134-5 (Supp. 1998), entitled "[p]ossession by licensed hunters and minors; target shooting; game hunting," provides in relevant part as follows:

> (a) Any person of the age of sixteen years, or over or any person under the age of sixteen years while accompanied by an adult, may carry and use any lawfully acquired rifle or shotgun and suitable ammunition while actually engaged in hunting or target shooting or while going to and from the place of hunting or target shooting; provided that the person has procured a hunting license . . . . A hunting license shall not be required for persons engaged in target shooting.

(Emphases added.) Thus, HRS § 134-5(a) provides for the lawful possession of a rifle or shotgun away from the possessor's place of business, residence, or sojourn while engaged in hunting or target shooting, but does not prescribe the manner in which the firearm is to be kept during transport.

Defendant contends that "both licensed hunters and unlicensed target shooters going to and from the place of hunting or target shooting are not subject to the requirements of HRS § 134-6(c)." In other words, when carrying firearms, those in lawful possession under HRS § 135(a) need not comply with the requirement that the firearm and ammunition be kept unloaded and in an enclosed container. This interpretation is clearly at odds with both the statutory language of HRS § 134-6(c) as well as the intent and purpose of the statutory scheme.

HRS § 134-6(c) specifically regulates how a firearm is to be carried between the listed places of lawful possession and use, which include, inter alia, "a target range," and "a place of formal hunter or firearm use training or instruction." The

reference in HRS § 134-6(c) to HRS § 134-5 merely incorporates the instances of lawful possession and use described therein. Thus, HRS § 134-5 specifically describes the lawful possession and use of firearms while engaged in hunting or target shooting, whereas 134-6(c) provides for the manner in which they may be transported. HRS § 134-5 states that a person may "carry or use" a rifle while "engaged in" hunting or shooting or while "going to and from" the place of hunting or shooting.

The legislative history of HRS § 134-6 reflects a concern for the safety of the individual in possession as well as the public. In 1984, the legislature increased the penalties for possession of a "loaded" firearm carried in violation of this statute and specifically required that unloaded firearms be kept in an "enclosed container." 1984 Haw. Sess. L. Act 178 § 1 at 338. The relevant senate committee report declared that:

> Under the present law, it is lawful to carry firearms, whether loaded or unloaded, in a wrapper or other suitable container [between designated places]. . . . The proposed amendment allowing persons to carry only unloaded firearms in certain instances reflects a concern for public safety, e.g., to minimize the chances of injury where a loaded weapon might accidentally discharge or to minimize the opportunities for spontaneous criminal activity.
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> Further, testimony . . . indicated that since the present terms "wrapper or suitable container" are not defined . . . . [t]he term "enclosed container" [as defined] more accurately reflects the legislative intent that firearm containers adequately secure the firearms and clarifies any ambiguity . . . .

Sen. Stand. Comm. Rep. No. 697-84, in 1984 Senate Journal, at 1360 (emphasis added). The concerns for public safety expressed in the legislative history apply whenever a firearm is being carried between places of lawful possession and use.

Accordingly, HRS § 134-6(c) requires that firearms and ammunition be carried unloaded and in an enclosed container in all instances of transport between the places of lawful possession and use described in both HRS §§ 134-5 and 134-6(c), including hunters and target shooters going to and from the place of hunting or target shooting. Therefore, "going to and from" the place of hunting or target shooting is only a defense under HRS § 134-6(c) if the firearms and ammunition were carried unloaded and in an enclosed container. In other words, even if Defendant carried or possessed an unloaded firearm in an enclosed container, he could still be in violation of HRS § 134-6(c) if he was not going to and from a place of lawful possession.

Thus, the prosecution can establish a violation of HRS § 134-6(c) if the prosecution proves that Defendant was away from his business, residence, or sojourn and negatives the exception provided in HRS § 134-6(c) by proving that Defendant either: (1) carried or possessed a loaded firearm (class B felony); (2) carried or possessed an unloaded firearm not in an enclosed container (class C felony); or (3) carried or possessed an unloaded firearm in an enclosed container (class C felony). "Going to and from" a place of lawful possession as described in the statute is only a defense to alternative (3), and Defendant bears the burden of proof regarding that defense because where Defendant was going to and from is a fact peculiarly within the

knowledge of the Defendant. See Jenkins, 93 Hawai‘i at 107, 997 P.2d at 33.

"Defendants are 'entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive or unsatisfactory the evidence may be." State v. Robinson, 82 Hawai'i 304, 313-14, 922 P.2d 358, 368 (1996), overruled on other grounds by State v. Tafoya, 91 Hawai‘i 261, 982 P.2d 890 (1999)). Father testified that he had unloaded the rifle before placing it in the truck, and the court instructed the jury on the lesser included offense of carrying an unloaded firearm, i.e., alternative (2) above. Defendant also presented evidence that he had been target shooting earlier that day and that, at the time of the stop, he was coming from his residence. However, Defendant did not present any evidence regarding where he was going at the time of the stop. Thus, Defendant was not entitled to an instruction as to the defense of "going to and from" a place of lawful possession. We note, however, that on retrial, Defendant may be entitled to a "going to and from" a place of lawful possession instruction, depending on the evidence presented.

2. The circuit court erred in instructing the jury regarding the requisite mental state with respect to the charged offenses.

The court instructed the jury that the requisite mental state as to Count I (place to keep loaded firearm) and Count II (place to keep ammunition) was "knowing." The court instructed the jury that the requisite mental state with respect to the lesser included offense of place to keep unloaded firearm was "intentional. . ., knowing. . ., or reckless. . . ." However, the requisite mental state as to each of these offenses is the same.

HRS §§ 134-6(c) and (e) are silent regarding the requisite state of mind with respect to conviction. HRS § 702-204 (1993) provides that, "[w]hen the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with respect thereto, a person acts intentionally, knowingly, or recklessly." Moreover, our recent decision in Jenkins recognized that, for the purposes of HRS § 134-6(e), "carry" and "possess"

> must be analyzed employing a two-pronged analysis: (1) the voluntary act of "carrying" [or "possessing"] an object is, by way of HRS § 702-202[(1993)[12]], established when an individual acts knowingly with respect to the conduct; and (2) the requisite state of mind with respect to the

[12] HRS § 702-202 provides that "[p]ossession is a voluntary act if the defendant knowingly procured or received the thing possessed or if the defendant was aware of the defendant's control of it for a sufficient period to have been able to terminate the defendant's possession." In Jenkins, we recognized that "[i]nasmuch as 'carrying' implies some kind of 'possession,' the 'knowing' requirement of HRS § 702-202 . . . is triggered." 93 Hawai'i at 112, 997 P.2d at 38.

> circumstances attendant to "carrying" [or "possessing"] that object . . . is, by way of HRS § 702-204, established by proof of a reckless state of mind.

Jenkins, 93 Hawai'i at 112-13, 997 P.2d at 38-39.

Accordingly, on remand, the trial court is cautioned to provide jury instructions regarding this matter that are consistent with the this opinion and with the two-pronged analysis in Jenkins, 93 Hawai'i at 37, 997 P.2d 13.

C. Sufficiency of the Evidence

Defendant contends that "there was no substantila evidence to support [Defendant's] convictions on Counts I and II where the State failed to prove that [Defendant] was not a licensed hunter or target shooter going to and from the place of hunting or target shooting." However, as previously discussed, the prosecution is not required to prove that Defendant was not "a licensed hunter or target shooter going to and from" a place of lawful possession. Although "going to and from" a place of lawful possession may be a defense in certain cases, see discussion supra, the pertinent facts are peculiarly within the knowledge of Defendant and thus, Defendant bore the burden of proving the defense, if applicable. Accordingly, Defendant's challenge to the sufficiency of the evidence based on the prosecution's failure to adduce evidence that Defendant was not a licensed hunter or target shooter going to and from the place of hunting of target shooting fails.

D. Sentencing

1. Defendant was denied the right to presentence allocution.

On appeal, Defendant also contends that the trial court deprived him of his constitutional right to presentence allocution by failing to allow him to speak prior to the imposition of his sentence. Although we are vacating Defendant's conviction and sentence on other grounds, inasmuch as the remedy for the denial of presentence allocution is resentencing before a different judge, see State v. Carvalho, 90 Hawai‘i 280, 288 n.11, 978 P.2d 718, 726 n.11 (1999); State v. Chow, 77 Hawai‘i 241, 248, 883 P.2d 663, 670 (App. 1994), we consider Defendant's contention.

HRS § 706-604(1) (1993) provides that, "[b]efore imposing sentence, the court shall afford a fair opportunity to the defendant to be heard on the issue of the defendant's disposition." Similarly, but more specifically, Hawai‘i Rules of Penal Procedure (HRPP) Rule 32(a) provides that, "[b]efore suspending or imposing sentence, the court shall address the defendant personally and afford a fair opportunity to the defendant and defendant's counsel, if any, to make a statement and present any information in mitigation of punishment." In addition, "pre-sentence allocution has been recognized as a due process right under the Hawai‘i Constitution." Carvalho, 90 Hawai‘i at 286, 978 P.2d at 724 (citations omitted).

Defendant's right to presentence allocution is protected by "affirmatively requir[ing] that the trial court make a direct inquiry of the defendant's wish to address the court before sentence is imposed. This limited burden on the trial court is outweighed by the beneficent policies served by the procedure." State v. Chow, 77 Hawai'i at 248, 883 P.2d at 670 (footnote omitted). In Chow, the court further noted:

> [T]o avoid litigation arising out of ambiguous records in order to determine whether the trial judge did address himself to the defendant personally, we think that the problem should be, as it readily can be, taken out of the realm of controversy. This is easily accomplished. Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter[,] trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.
>
> Green v. United States, 365 U.S. 301, 305 (1961). The right is one easily administered by the trial court by the following inquiry: "'Do you, . . . [(defendant's name)], have anything to say before I pass sentence?'" Id. at 303.
>
> Once defendants are afforded a "personal invitation to speak" under this procedure, no questions should arise in future cases as to silence, ambiguity, or waiver with respect to the right of allocution.

Id. (some citations omitted) (some brackets in original). Thus, where the court does not provide the defendant a "personal invitation to speak" and there is any ambiguity or question regarding whether the defendant was afforded a fair opportunity to speak, we must conclude that the defendant was denied the right to presentence allocution. As previously stated, the remedy for denial of Defendant's right of allocution is resentencing before another judge. See Carvalho, 90 Hawai'i at 288 n.11, 978 P.2d at 726 n.11; Chow, 77 Hawai'i at 248, 883 P.2d at 670.

The record reflects that Defendant's counsel made statements to the court and presented information in mitigation of punishment. First, when asked by the court whether counsel had received the presentence report (PSI), counsel responded by saying, "[Defendant] would like a couple of things noted as corrections." Next, defense counsel made corrections to Defendant's name, age, and social security number. The court then asked defense counsel, "Anything else you want to add?" The following exchange took place:

> [DEFENSE COUNSEL]: Your Honor, the [c]ourt is aware of [Defendant's] position in this. He doesn't appear to be a danger to himself or the community. Looking at his record, while there are a lot of driving offenses and not showing up offenses, his past--and the conduct that night indicate[] that he certainly isn't dangerous in terms of using a weapon. The second is that he simply did not know or remember that the rifle was there and there was no indication that he would ever use it.
>
> Under, those circumstances, your Honor, a person, like this, I would submit to the [c]ourt, should not--the [c]ourt should consider probation with special terms that the [c]ourt can draft that can be very stringent so that the things we want to accomplish in terms of punishment, deterrents, and so on, are accomplished. But an open term appears to be unreasonably harsh for []his past.
>
> He's been very conscientious. He's helped me greatly at the trial. He's very forthcoming. And I think he would benefit by a term of probation. That's all I have to say your Honor. [Defendant's father] did want to, as a father, say something to the [c]ourt.
>
> [THE COURT]: You want to say something?
>
> [DEFENSE COUNSEL]: The father, your Honor, his father.
>
> [THE COURT]: He may say.
>
> . . . .
>
> [FATHER]: I'm not much of a speaker, but I have so much problems with (unintelligible) the [c]ourt.
>
> [THE COURT]: Okay.
>
> [FATHER]: (Inaudible)
>
> [DEFENSE COUNSEL]: Thank you. The only thing I wanted to add, I thought [his father] might mention, is [the father] informs me that he doesn't really read or write and depends on [Defendant] to help him with things like insurance and business and payments and so on. Thank you.
>
> [PROSECUTOR]: Your Honor, a circuit court jury found the Defendant guilty of being in possession of a loaded firearm. The potential for danger was high, given the fact that he is a multiple felon, has been convicted of multiple

> felonies. His criminal record dates back almost -- over 20 years. Given the extensive history of the Defendant and the fact that he was found in possession of a semiautomatic firearm, the State would be requesting that the [c]ourt impose the maximum incarceration.
>
> [THE COURT]: [Defendant], this court sat through the trial. You are a convicted felon and you had possession of a firearm, and a loaded firearm at that.
>
> [DEFENDANT]: Based--your Honor, can you specify convicted--multiple convicted felon? I mean --
>
> [THE COURT]: You had a felony conviction before.
>
> [DEFENDANT]: When?
>
> [THE COURT]: 1975.
>
> [DEFENDANT]: That's a petty misdemeanor, theft?
>
> [THE COURT]: No. Theft in the second degree.
>
> [DEFENDANT]: Gee, I didn't (inaudible) that.
>
> [THE COURT]: Likewise, it appears from your record that you will not comply with court orders, et cetera, based on the numbers of criminal contempt convictions you have dating back to 1981 and up to and including . . . [1998]. Plus you have further charges against you in which bench warrants were issued.
>
> Under the circumstances, if the [c]ourt gave you probation, it would only mean that this [c]ourt would have to see you again, under the circumstances, for violating the terms and conditions of probation. Likewise, [Defendant], you did not even want to participate in the presentence investigation or diagnosis and report. So we have no input with reference to what you were thinking at the time of your offense. Except, to a certain extent, this [c]ourt heard the testimony at trial.
>
> Under the circumstances, considering your past record, considering the number of contempts you have and the [c]ourt's feeling that you will not, in any event, be able to comply with the terms and conditions of probation -- and it will be futile for the [c]ourt to give you probation and just have you come back and revoke it again.

(Emphases added.) The court then sentenced Defendant to the maximum term of imprisonment, ten years for Count I and five years for Count II, to run concurrently. Defendant was not allowed any further opportunity to speak. The court did not at any point specifically ask Defendant if he had anything to say.

The law clearly requires the court to provide Defendant a personal invitation to speak and the purpose of the rule is to avoid any ambiguity. Chow, 77 Hawai‘i at 247-48, 883 P.2d 669-70. The record reflects that defense counsel presented

information and statements to mitigate the sentence. At one point, the court did personally address Defendant inasmuch as the court made a statement directly to Defendant, and Defendant spoke up on his own to question the court's characterization of him as a convicted felon. Viewing the sentencing hearing as a whole, one could argue that Defendant was given a fair opportunity to be heard through his counsel. However, there is some ambiguity regarding whether Defendant was personally afforded the opportunity to address the court. Moreover, the court never specifically provided Defendant "a personal invitation to speak" as required under Chow. If Defendant is convicted on remand, the sentencing court must ensure that Defendant is fully afforded his right to presentence allocution.

2. The court relied on inaccurate information in sentencing Defendant.

Although not raised as a point of error on appeal, the trial court relied upon the erroneous belief that Defendant had a prior felony conviction when imposing its sentence. We address this error now to avoid the same mistake on remand in the event of conviction and sentencing.

HRS § 706-606 (1993) provides:

> The court, in determining the particular sentence to be imposed, shall consider:
> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) The need for the sentence imposed:
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
> (b) To afford adequate deterrence to criminal conduct;
> (c) To protect the public from further crimes of the defendant; and

> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) The kinds of sentences available; and
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

"In ascertaining the defendant's 'characteristics' for the purposes of HRS § 706-606(1) . . . a sentencing court may consider any and all accurate information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." State v. Vinge, 81 Hawai'i 309, 323, 916 P.2d 1210, 1224 (1996) (some emphasis added) (citations omitted).

During sentencing, the prosecution requested that the court impose the maximum sentence, arguing that

> Defendant [was found] guilty of being in possession of a loaded firearm. The potential for danger was high, given the fact that he is a multiple felon, has been convicted of multiple felonies. His criminal record dates back . . . over 20 years. Given the extensive history of the Defendant . . . .

The court then addressed Defendant, stating "[y]ou are a convicted felon and you had possession of a firearm, and a loaded firearm at that." Defendant interrupted the court, asserting his belief that his prior conviction of theft in the second degree in 1975 was a misdemeanor. The trial court rejected this contention, emphatically stating that theft in the second degree was a felony.

Based on our review of the presentence report, it is clear that the prosecutor mischaracterized Defendant's history and that the court was in error regarding Defendant's prior conviction of theft. Although the court was correct that, under

current law, theft in the second degree is a felony, HRS § 708-831 (1993), in 1975, the crime of theft in the second degree was a misdemeanor. HRS § 708-832 (1976).[13] Indeed, the presentence report provided to the trial court contains no reference to any prior felony convictions.

If Defendant is convicted on remand, we caution the trial court to review the presentence report, keeping in mind the matters discussed herein.

IV. CONCLUSION

Based on the foregoing, we vacate Defendant's conviction and sentence and remand this case for further proceedings. If Defendant is convicted on remand, he is entitled to resentencing before a different judge.

DATED: Honolulu, Hawai'i, September 21, 2000.

On the briefs:

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[13] HRS § 708-832(c) provided that "[t]heft in the second degree is a misdemeanor except in the event of extortion, in which case theft in the second degree is a class C felony." The presentence report does not list Defendant's theft as extortion and does not contain any reference to the crime as a felony.