NO. 22499

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

ERIK EKENBERG, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 98-0631(1))

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Ramil, JJ., and Circuit Court Judge Marks, assigned by reason of vacancy)

The defendant-appellant Erik Ekenberg appeals from the second circuit court's judgment of conviction of and sentence for the offense of unauthorized control of a propelled vehicle, in violation of Hawai'i Revised Statutes (HRS) § 708-836 (1993 & Supp. 1996), filed on April 21, 1999. On appeal, Ekenberg contends: (1) that the circuit court erroneously denied his motion to suppress statements he made to a police officer, because his statements were not made voluntarily and were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966); (2) that his trial counsel's failure to file a motion to suppress, presumably, all evidence obtained as a result of his allegedly unlawful warrantless seizure constituted ineffective assistance of counsel; (3) that the circuit court abused its discretion in admitting the "lay opinion" testimony of Greg Kessell, the manager of Maui Motorcycle, as relevant to Ekenberg's state of mind; and (4) that the prosecution committed misconduct (a) by proffering Kessell's testimony and (b) by

asserting in closing argument that Ekenberg's testimony was "a lie" due to Ekenberg's failure to proffer the testimony of an alibi witness.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we vacate the circuit court's judgment of conviction and sentence and remand the present matter for a new trial conducted consistently with this order. Our analysis with regard to each of Ekenberg's points of error is as follows:

(1) Even if, as Ekenberg argues, the circuit court erred in admitting Ekenberg's statements to a police officer because they were the product of custodial interrogation, we hold that the error was harmless beyond a reasonable doubt. Ekenberg's statements were exculpatory and, as he argued at trial, if believed, gave rise to reasonable doubt concerning his guilt of the charged offense. Therefore, the admission of his statements into evidence could not have contributed to his conviction. See State v. Hong, 62 Haw. 83, 85-86, 611 P.2d 595, 597 (1980) (holding trial court's admission into evidence of defendant's exculpatory statements obtained in violation of defendant's Miranda rights harmless beyond a reasonable doubt because the statements could not have contributed to defendant's conviction);

(2) With regard to Ekenberg's ineffective assistance of counsel claim, we hold that Ekenberg's trial counsel did not provide Ekenberg with constitutionally deficient assistance. Beyond the general assertion that Ekenberg's trial counsel was ineffective for not filing a motion to suppress predicated on a police officer's encounter with him, Ekenberg's appellate counsel

does not articulate what specific evidence necessary to convict Ekenberg would have been suppressed had the posited motion been filed.

In any event, the suppression issue that Ekenberg posits should have been raised is without merit. As noted above, the admission at trial of testimony regarding exculpatory statements elicited from Ekenberg during his encounter with a police officer was harmless beyond a reasonable doubt. The only other evidence adduced at trial that, arguably, resulted from the officer's encounter with Ekenberg was testimony and demonstrative evidence regarding the appearance and condition of the motorcycle and the officer's discovery, by tracing the vehicle identification number (VIN), that the motorcycle was reported stolen. However, the officer's observations of the outward appearance and condition of the motorcycle did not violate an objectively reasonable expectation of privacy that Ekenberg may have subjectively had in the appearance and condition of the motorcycle. See State v. Wallace, 80 Hawai‘i 382, 392, 910 P.2d 695, 705 (1996) ("Like the fourth amendment to the United States Constitution, article I, section 7 of the [Hawai‘i] State Constitution protects people from unreasonable governmental intrusions into their legitimate expectations of privacy." (Citations and internal quotation marks omitted.)). Ekenberg knowingly exposed the outward appearance and condition of the motorcycle to the public and, therefore, the motorcycle's appearance and condition were not subject to the protection of the fourth amendment to the United States Constitution or article I, section 7 of the Hawai‘i Constitution. See State v. Kapoi, 64 Haw. 130, 139, 637 P.2d 1105, 1112-13 (1981); see also State v. Bonnell, 75 Haw. 124, 143, 856 P.2d 1265, 1275 (1993).

Moreover, "[i]n assessing the objective reasonableness of an expectation of privacy, we consider[:] (1) 'the nature of the area involved'; (2) 'the precautions taken to insure privacy'; and (3) 'the type and character of [the] governmental invasion' employed." State v. Augafa, 92 Hawai'i 454, 464, 992 P.2d 723, 733 (App. 1999) (quoting Bonnell, 75 Haw. at 143, 856 P.2d at 1275 (citation omitted)). The "area involved" in the present matter was the outward appearance of a motorcycle situated on a public street. The police officer's visual observations of the motorcycle were made from a constitutionally unprotected, "non-intrusive" vantage point as he stood "outside" (on a public street) looking "outside" (at a motorcycle that Ekenberg had knowingly exposed to the public by operating it on that same public street). See Kapoi, 64 Haw. at 140 n.11, 637 P.2d at 1113, n.11. Thus, the officer's observations fell within the "open view" doctrine. See id. ("[i]n the 'open view' situation . . . the observation takes place from a non-intrusive vantage point. The government agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public," (citations omitted); see also State v. Kaaheena, 59 Haw. 23, 28-29, 575 P.2d 462, 466-67 (1978); Augafa, 92 Hawai'i at 464-65, 992 P.2d at 733-34. Ekenberg did not take any precautions to ensure that the outward appearance of the motorcycle remained private. Finally, the officer's invasion was no more than a visual inspection of the outward appearance of the motorcycle. Thus, neither the public area in which the officer observed the motorcycle nor the outward appearance of the motorcycle itself were constitutionally protected because Ekenberg did not have an objectively reasonable expectation of privacy in either. Consequently, the officer's

visual observations of the motorcycle did not constitute a "search." See Wallace, 80 Hawai'i at 393-94, 910 P.2d at 706-07 ("absent a governmental invasion of a person's legitimate expectations of privacy, there is no 'search' in the constitutional sense," (citations omitted)). The evidence concerning the appearance of the motorcycle, therefore, was not suppressible.

The officer's "open view" observations of the motorcycle were that the paint job was shabby and that the side-panels and the license plate had been removed. These observations were sufficient to warrant the officer to form the belief that an offense had been or was being committed, to wit, either a theft-related offense or unauthorized control of a propelled vehicle, and/or a traffic violation due to the missing license plate. Cf. State v. Navas, 81 Hawai'i 113, 117, 913 P.2d 39, 42 (1996). Thus, assuming arguendo that the VIN was not in open view, the officer was justified, in the absence of a warrant, in "searching" the motorcycle for the VIN, inasmuch as he had probable cause to do so and exigent circumstances were present -- i.e., the mobility of the motorcycle, which posed not only a risk that Ekenberg might escape, but also "threatened the removal of . . . evidence." State v. Dorson, 62 Haw. 377, 384, 615 P.2d 740, 746 (1980). Consequently, the officer's discovery that the motorcycle had been stolen by tracing the VIN was not "fruit of the poisonous tree" and, therefore, was not suppressible.

In light of the forgoing analysis, Ekenberg has not demonstrated that the failure of his trial counsel to file a motion to suppress evidence allegedly obtained in violation of Ekenberg's constitutional rights under the fourth amendment to

the United States Constitution and/or article I, section 7 of the Hawai‘i Constitution deprived him of a "potentially meritorious" defense. See State v. Dan, 76 Hawai‘i 423, 427, 879 P.2d 528, 532 (1994); State v. Silva, 75 Haw. 419, 439-40, 864 P.2d 583, 593 (1993);

(3) As to Ekenberg's third point of error, we hold that Kessell's testimony that the motorcycle "appeared [to him] to be stolen" was irrelevant to the issue of Ekenberg's state of mind and, therefore, that the circuit court erred in allowing the prosecution to adduce his testimony. In order to prove that Ekenberg was guilty of violating HRS § 708-836, the prosecution was required to prove beyond a reasonable doubt, inter alia, that he "intentionally exert[ed] unauthorized control over another's [motorcycle] by operating [it] without the owner's consent." Inasmuch as the question whether Ekenberg had the owner's consent constitutes an attendant circumstance, the prosecution was also required to prove that Ekenberg was aware, believed, or hoped that he did not have the owner's consent. See HRS §§ 701-114(1)(a) and (b) (1993), 702-207 (1993), 702-205 (1993), and 702-206(1)(b) (1993). Ekenberg testified that his experience with motorcycles was limited. Inasmuch as Kessell testified as to his personal opinion, formed on the basis of his experience as a motorcycle dealer and his observation of the motorcycle, that it appeared to him to be stolen, his opinion was irrelevant to whether Ekenberg was aware, believe, or hoped that he did not have the owner's consent because the motorcycle appeared to Ekenberg to be stolen. Therefore, Kessell's testimony was inadmissible. See HRE Rule 401 and Rule 402.

We further hold that the circuit court's erroneous admission of Kessell's testimony was not harmless beyond a reasonable doubt. The only other evidence adduced at trial from which the jury could infer that Ekenberg was aware, believed, or hoped that he did not have the permission of the owner of the motorcycle to be operating it was the condition of the motorcycle itself. Thus, we cannot say that there was no reasonable possibility that the jury did not rely on Kessell's opinion testimony in considering the charged offense of unauthorized control of a propelled vehicle;

(4) As to Ekenberg's prosecutorial misconduct claim, we hold as follows:

(a) Ekenberg's bald assertion that the prosecution's proffer of Kessell as a rebuttal witness constituted prosecutorial misconduct is without merit, inasmuch as the error due to the admission of Kessell's testimony was solely attributable to an abuse of discretion by the circuit court; and

(b) Ekenberg's claim that the prosecution's closing argument constituted prosecutorial misconduct is also without merit, inasmuch as: (i) the record reflects that the prosecutor did not assert that Ekenberg was obligated to produce witnesses, and, in any event, the circuit court generally instructed the jury that the defense was not under any obligation to produce witnesses; and (ii) the prosecutor's comments concerning Ekenberg's credibility were not impermissible expressions of personal belief but, rather, constituted legitimate argument with regard to the inferences that reasonably could be drawn from the conflicting state of the evidence concerning Ekenberg's state of mind (to wit, Ekenberg's testimony, on the one hand, that he believed he had obtained the consent of the owner to operate the

motorcycle because a person holding himself out as the owner had offered to trade it for a truck that Ekenberg had been restoring for four years and, on the other, the evidence respecting the debased condition of the motorcycle). See State v. Clark, 83 Hawai‘i 289, 304-06, 926 P.2d 194, 209-11 (1996). Therefore,

IT IS HEREBY ORDERED that the second circuit court's judgment of conviction and sentence, filed on April 21, 1999, is vacated, and the present matter is remanded for a new trial conducted consistently with this order.

DATED: Honolulu, Hawai‘i, August 31, 2000.

On the briefs:

Matthew S. Kohm, for the
defendant-appellant,
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