NO. 22441

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee v.
RITCHIE TRENDA, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT
OF THE THIRD CIRCUIT, SOUTH KOHALA DIVISION
(POLICE REPORT NO. F-70670/SK)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

On March 31, 1999, pursuant to Hawaiʻi Rules of Penal Procedure (HRPP) Rule 11(a)(2), Defendant-Appellant Ritchie Trenda (Trenda) entered a conditional plea of no contest to the charges of failing to have a safety check, Hawaiʻi Revised Statutes (HRS) § 286-25, driving left of center on a roadway, HRS § 291C-46(a), and driving under the influence of intoxicating liquor, HRS § 291-4. He was found guilty and sentenced.[1]

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[1] Defendant-Appellant Ritchie Trenda was sentenced as follows:

> THE COURT: Mr. Trenda, on the safety check, I'm going to sentence you to a fine of $20. On the charge of driving left of center, I'm going to sentence you to a fine of $35, plus $7, to the Driver's Education Fund. That is consecutive.
>
> On the DUI, I'm sentencing you as follows: I'm sentencing you to a fine of $15, plus $107, to the Driver's Education Fund and $25, to the Criminal Injury Claims Fund. I'm also ordering that you attend 14 hours of an alcohol abuse rehabilitation program that is conducted by our Driver's Education Division.

(continued)

Trenda appeals the district court's May 4, 1999 Order Denying Defendant's Motion to Suppress (May 4, 1999 Order).

BACKGROUND

At the beginning of the hearing on March 31, 1999, the following was stated in relevant part:

> THE COURT: Ready to proceed to trial?
>
> [DEFENSE COUNSEL]: Actually, our motion is to suppress.
>
> THE COURT: Well, this is the trial, isn't it, as well? We're doing the trial at the same time, aren't we?
>
> [DEPUTY PROSECUTING ATTORNEY]: Judge, my understanding of the situation is that we will be having the motion to suppress, depending upon the Court's ruling on the motion to suppress, if the motion to suppress is granted, obviously, the trial will not take place. If the motion to suppress is not granted, my understanding is that the defendant would be offering a Rule 11, conditional plea.
>
> . . . .
>
> [DEFENSE COUNSEL]: If I may, Your Honor, I stated my objection to not being allowed to have a pre-trial motion hearing and I tried to schedule it and was told that Your Honor wasn't

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(continued)

> In addition, I'm requiring that you have a substance abuse assessment by a certified substance counselor and to follow any recommendations of that assessment.
>
> Finally, I'm ordering that your license be suspended for 90 days. . . .
>
> . . . .
>
> I'm ordering, Mr. Trenda, that your license be suspended for 90 days and since you are working, with the first 30 days absolute and the remaining period of the 90 days conditional, providing you with conditional license to go to and from work and to and from any alcohol classes. But since you may be filing an appeal, we will stay that to determine if you're going to file an appeal.
>
> . . . .
>
> And if a notice of appeal is filed the sentence will be stayed pending appeal.

allowing pre-trial motion hearings on any date, but the [trial] date.

The prejudice to my client is that because we weren't able to bring you here any earlier, are [that] witnesses have -- or may have some memory loss. Our position is that under the rules that we should have been allowed to hold this hearing a month ago and we weren't so allowed and my client doesn't have the benefit of a report to refresh his recollection, which the police officer does and [the Deputy Prosecuting Attorney] did serve it on me yesterday and I believe that she, in good faith, did not know that it existed prior to serving it on me and served it on me promptly as soon as she learned of it.

Based upon the March 31, 1999 hearing, the circuit court issued the May 4, 1999 Order stating in relevant part as follows:

Now, therefore, the Court finds as follows:

. . . .

3. The Court finds Officer Jeremie Evangelista to be a credible witness.

4. The Court finds Defendant Ritchie Trenda to be a credible witness;

5. The Court does not find defense witness Larry Larson to be a credible witness, based on the incredible difference between his testimony and the testimony of witnesses Evangelista and Trenda;

6. On August 28, 1998, both [Trenda] and Officer Evangelista were headed mauka on Kawaihae Road. The officer, who was following [Trenda] observed [Trenda] to swerve over the centerline while rounding a right hand curve;

7. Upon getting closer to [Trenda's] vehicle, [Officer] Evangelista observed that the safety sticker was expired;

8. Officer Evangelista initiated a traffic stop by turning on his flashing blue lights. It was Officer Evangelista's observation that [Trenda] took a long period of time to pull off the roadway;

9. Officer Evangelista requested that [Trenda] produce his driver's license, vehicle registration and proof of insurance;

10. Officer Evangelista observed [Trenda] fumbling for his license and fumbling for his other documents;

11. [Trenda's] speech was observed to be slow by Officer Evangelista and [Trenda] was observed to have watery eyes;

12. Officer Evangelista noticed the smell of alcoholic beverage during his conversation with [Trenda] about the papers;

13. The Court finds that the odor of alcohol is not uncommon, can be smelled, and is a recognizable smell, requiring no further description;

14. Defendant was asked if he had been drinking;

15. [Trenda] said he had a couple of pau hana beers at Tres Hombres in Kawaihae;

16. Defendant was asked to get out of his car;

17. Defendant exited his pick-up in an unusual fashion;

18. As [Trenda] walked to the rear of his pick-up, [Trenda] stumbled into the side of his vehicle;

19. Officer Evangelista smelled alcohol again when he was at the rear of the pick-up with Defendant.

20. At the rear of the pick-up, Officer Evangelista conducted a test described as Horizontal Gaze Nystagmus (HGN) on [Trenda];

21. Officer Evangelista had conducted this test 50 to 100 times previously and found there to be a correlation between the factors he tested for and [the] level of intoxication of the test subject;

22. [Officer Evangelista] was of the opinion that [Trenda] failed the HGN test . . . .

23. No further field sobriety tests were given to [Trenda];

24. [Trenda] was placed under arrest after the HGN test.

THE COURT THEREFORE CONCLUDES AS A MATTER OF LAW:

1. Rule 12 of the Hawaii [Hawai‘i] Rules of Penal Procedure requires only that pretrial motions be heard prior to trial;

2. Officer Evangelista had probable cause to stop the vehicle [Trenda] was driving;

3. The case law of this State does not require Miranda rights before asking a motorist if he has been drinking, under the circumstances presented;

4. Officer Evangelista, at the time he asked [Trenda] to get out of the pick-up, had reasonable grounds to suspect [Trenda] had been driving under the influence;

5. The Court is not aware of any authority which requires that field sobriety tests be administered in order to establish probable cause to arrest for DUI;

6. Under the totality of the circumstances, there was probable cause to arrest [Trenda] for DUI;

. . . .

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that [Trenda's] Motion to Suppress filed October 29, 1998, and heard on March 31, 1999 is denied.

REQUIREMENT, DEFINITION, AND STANDARD OF REVIEW

Under the safeguards of the fourth amendment to the United States Constitution and article I, section 7 of the Hawai‘i Constitution, all arrests and searches must be based upon probable cause.

Probable cause exists when the facts and circumstances within one's knowledge and of which one has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been committed. See, e.g., State v. Jerome, 69 Haw. 132, 134, 736 P.2d 438, 439 (1987).

State v. Navas, 81 Hawai‘i 113, 116, 913 P.2d 39, 42 (1996) (footnotes omitted).

Therefore, in light of: (1) article I, section 7 of the Hawai‘i Constitution, which provides Hawai‘i's citizens greater protection against unreasonable searches and seizure than the United States Constitution; (2) the advantages of reviewing probable cause determinations de novo as discussed in part I.A.3; and (3) the importance of consistency with our recent decisions involving motions to suppress, the determination of probable cause for the issuance of a search warrant warrants de novo review on appeal.

Id. at 123, 913 P.2d at 49.

Appellate review of factual determinations made by the trial court deciding pretrial motions in a criminal case is governed by the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm conviction that a mistake has been made. The circuit court's conclusions of law are reviewed under the right/wrong standard. Furthermore, in a case such as the one at bar, the proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his own Fourth Amendment rights were violated by the search and seizure sought to be challenged.

> The proponent of the motion to suppress must satisfy this burden of proof by a preponderance of the evidence.

State v. Balberdi, 90 Hawai‘i 16, 20-21, 975 P.2d 773, 777-78 (1999) (citing State v. Anderson, 84 Hawai‘i 462, 466-67, 935 P.2d 1007, 1011-12 (1997)).

DISCUSSION

1.

Trenda asserts that Conclusion of Law (COL) no. 6 is wrong for the following reasons:

(a) The "facts and circumstances were not sufficient to warrant an arrest[.]"

(b) "[T]he trial court erred by concluding that under the totality of the circumstances a field test for horizontal gaze nystagmus (HGN) was sufficient to establish probable cause to arrest for DUI[.]"

(c) "A Court may not, however, base the existence of probable cause solely on HGN test results. State v. Ito, [90 Hawai‘i 225, 978 P.2d 191 (App. 1999)].

(d) Trenda's conduct did not show clear indicia of the commission of the crime of DUI, and the HGN test alone was insufficient to establish probable cause[.]"

Trenda raises the question of "[w]hether under the totality of the circumstances an HGN test was sufficient to establish probable cause to arrest Defendant for DUI?" He concludes with the statement that "[g]uidance from this Court

would help to establish exactly what constitutes 'specific procedures' of field sobriety testing required to establish probable cause to arrest for DUI[.]"

We conclude that Trenda misinterprets Ito which states, in relevant part, that

> [t]he vast majority of courts across the country that have considered the issue have had no difficulty concluding that as long as the proper foundational prerequisites are met, HGN test results may be admitted as evidence of probable cause to arrest a person for DUI, although not to prove intoxication or that a defendant's BAC exceeded a particular percentage.

Ito, 90 Hawai‘i at 232-33, 978 P.2d at 198-99.

In Trenda's case, the record is clear that the court considered not only the results of the HGN test but the other relevant evidence as well.

2.

In a memorandum in support of his motion to suppress, Trenda asserted, in relevant part, as follows:

> In his report, Officer Evangelista noted that he "detected the odor of an alcoholic beverage upon his breath." This language is a littany [sic] from prior Hawaii judicial decisions that police officers are taught to write, and do write in virtually every report of an alleged DUI. The odor is unidentifiable, therefore the words are meaningless.

The transcript of the hearing reports, in relevant part, as follows:

> [BY DEFENSE COUNSEL]:
>
> Q. Would you, please, describe the odor of intoxicating beverage?
>
> A. Through training and experience, I've learned to recognize the odor of an alcoholic beverage on someone's breath when they speak.
>
> Q. What does it smell like?

A. I[t] smells like an intoxicating liquor, whether it be beer -

Q. I'm not asking you to make a conclusion, I'm asking what an intoxicating liquor smell smells like?

[DEPUTY PROSECUTOR]: I would object as to relevance, again. He's testified that he is familiar with the smell. He can examine him as to his history of that, I guess.

. . . .

THE COURT: [Defense Counsel], number one . . . , first of all I'm going to sustain the objection. Secondly, . . . from your memorandum, however if that is your position on the smell of alcoholic beverages, I sure hope you have some proof, because if you're planning to do this on cross examination, you have no proof to base your assertion in your memorandum.

Go ahead.

[DEFENSE COUNSEL]: I'm asking him what intoxicating liquor smells like. He simply made a conclusiary [sic] statement and I'm asking him what it smells like.

Are you sustaining that objection?

THE COURT: [Defense Counsel], I don't know how you can describe a smell, a smell is a smell, it doesn't matter where it's --

[DEFENSE COUNSEL]: It's very easy, you can say it's acrid, you can say it's sharp, you can say -- there are any number of things. The real objection here is the question of --

THE COURT: [Defense Counsel], I don't think it's relevant. I'm going to sustain the objection. Go onto your next question.

[DEFENSE COUNSEL]: Very well.

Trenda contends that Finding of Fact (FOF) no. 13 "is clearly erroneous because the smell of intoxicating liquor is not an adjudicative fact that can be judicially noticed, and because preclusion of defense questioning to distinguish this smell from other smells impermissibly infringes the defendant's due process right to be afforded a meaningful opportunity to present a complete defense." This point lacks merit because FOF no. 13

refers to "the odor of alcohol" and not to "the smell of intoxicating liquor[.]"

Trenda raises the question of "[w]hether the trial court erred by finding that the smell of alcohol is recognizable and requires no description, and therefore precluding Defendant from cross-examining the State's witness as to distinctions between the odor of an intoxicant and other smells?" In answering the question, he argues that "[t]he trial court denied Trenda due process by precluding him from ascertaining whether the State's witness had personal knowledge, or had instead mere training on how to obtain convictions."

Trenda was wrong when he asserted that Officer Evangelista did not answer the question. The record shows that Officer Evangelista was asked to describe "the odor of intoxicating beverage" and that he answered the question. If Trenda wanted Officer Evangelista to be more specific, he did not ask the proper question.

Finally, this argument lacks merit because Trenda testified and admitted that he "had a couple of pau hana beers."

3.

Trenda contends that COL no. 1 "is wrong because Trenda sought a hearing on his Motion to Suppress on November 5, 1998, and the Court had a duty to provide prompt disposition on the

motion." We conclude that COL no. 1 is not wrong because it accurately states what HRPP Rule 12 requires.

Trenda's argument pertains to the part of HRPP Rule 12 that states, "Every pretrial motion is subject to prompt disposition through due diligence by all concerned." State v. Soto, 63 Haw. 317, 321, 627 P.2d 279, 281 (1981). Based on the following facts, we conclude that HRPP Rule 12 was not violated. Trenda was arrested on August 28, 1998. He filed his motion to suppress on October 29, 1998. Trenda wanted a hearing in November, however, he stated that he was informed by the clerk that the court was not scheduling pretrial motions prior to trial date.[2] Trenda did not file a motion asking the court to deviate from its policy as stated by the clerk. The trial date was scheduled on January 13, 1999. On December 23, 1998, the parties agreed to postpone the trial because defense counsel had another trial. The only prejudice alleged by Trenda was unspecified memory loss. The court found that there was no undue prejudice.

4.

Trenda contends that either FOF no. 3 or FOF no. 4

> is clearly erroneous because Officer [Evangelista] testified that Trenda made a statement that he had a couple of beers at Tres Hombres while Trenda was in the truck, but Trenda testified that

[2] At the March 31, 1991 hearing, the court explained that "it's a matter of economics. If the same witnesses are needed for trial as a motion to suppress, it doesn't really make much sense to schedule it at two separate dates, if we're going to have the same witnesses. Then, we have duplicity, we have an enormous case load here. We can barely meet Rule 48 requirements as it is[.]"

> he made this statement when he was standing at the rear. These testimonies, even if not diametrically opposed, cannot both be credible. The Court's findings fail [to] address this inconsistency.

We conclude that Trenda is attempting to make a mountain out of an ant hill. Where Trenda was when he made the statement is not an issue in the case. The inconsistency in the testimonies of the location where the statement was made is not a material inconsistency.

5.

Larry Larson (Larson) was riding with Trenda when Trenda was stopped. Larson testified in relevant part as follows:

> Q. Did, at anytime, the officer say anything about drinking?
>
> A. At one point, yes, he did.
>
> Q. What did he say?
>
> A. He said, have you been drinking?
>
> Q. And did Mr. Trenda reply?
>
> A. He said no.

FsOF nos. 3, 4, and 5 obviously refer to Larson's testimony that Trenda answered "no" when asked by Officer Evangelista whether Trenda had been drinking. This is the material inconsistency between Larson's testimony and Trenda's and Officer Evangelista's testimony.

Trenda contends that FOF no. 5 "is clearly erroneous because (1) [the] testimony of Officer [Evangelista] and Trenda was in opposition; and, (2) Larson's testimony provided a

plausible reason for the inconsistent testimonies of Officer [Evangelista] and Trenda."

Trenda phrases the question as follows: "Whether the trial court erred by finding [that] a defense [witness'] testimony contained an 'incredible difference' from the 'credible' testimony of both Defendant and the police officer, where the testimony of the officer and Defendant was inconsistent, and the testimony of the third witness could explain the inconsistency?"

According to Trenda,

> Larson's testimony provides a plausible explanation for incons[is]tencies between the testimonies of Officer [Evangelista] and Trenda. Officer [Evangelista] testified that he asked Trenda while Trenda was in the truck whether he had been drinking, and Trenda replied that they had stopped for a couple of beers. Trenda testified that he did not remember Officer [Evangelista] asking this question when Trenda was in the truck. Trenda testified that at the rear of the truck, Officer [Evangelista] asked him where he and Larson were coming from, and Trenda replied that they had been working all day and had stopped at Tres Hombres for a couple of pau hana beers.
>
> The plausible explanation is that Trenda did not remember Officer [Evangelista] asking about drinking while Trenda was in the truck, but that Trenda did not consider a couple of pau hana beers "drinking, and answered "no," which he did not remember. Then, at the rear of the truck, when asked where he was coming from, a completely different question, he replied that he had been working and stopped for a couple of beers, which still was not "drinking" to him, so he volunteered this information. Officer [Evangelista] simply forgot when Trenda made the statement, just as he forgot returning to his police vehicle to run checks on Trenda's documents, which is standard police traffic stop procedure.

Trenda's argument lacks merit.

6.

In his opening brief, Trenda notes that "[i]n his Memorandum in Support of Motion, Trenda raised a Miranda

issue . . . At the hearing, however, so many unforseen [sic] issues arose that Trenda elected to forego any argument on the Miranda issue."

Trenda contends that COL no. 3 "is wrong because it addresses the wrong issue. The issue is whether or not, when Trenda asked whether he had a right to call his lawyer, Officer [Evangelista] was required to explain to Trenda that under Hawaii's [Hawai‘i's] implied consent law he did not."

Officer Evangelista testified, in relevant part, as follows:

> Q. Other than [the HGN] test, did you do any tests at the scene?
>
> A. No.
>
> Q. And the reason for that was?
>
> A. . . . .
>
> Also, when after doing the horizontal gaze nystagmus and asking if he was still willing to participate, the defendant said that he wasn't sure what was going on and didn't know if he should continue to participate before speaking to his lawyer.
>
> . . . .
>
> Q. I believe that you testified that Mr. Trenda asked you whether he should consult a lawyer; is that correct?
>
> A. He said he wasn't sure if he should continue without consulting a lawyer.
>
> Q. Okay. And did you make any response to that?
>
> A. I told him that if he did not wish to continue that was his choice, that I had enough probable cause to arrest him at that point already and that was what was going to happen.

Trenda raises the question of "[w]hether the trial court erred by concluding that Miranda rights were not required, but Hawaii [Hawai‘i] law requires that if an arrestee requests

counsel, he must be informed that he has no right to counsel?" He argues in his opening brief that

> Trenda testified that Officer [Evangelista] told him he could not speak to his lawyer, but did not tell him why. Officer [Evangelista] testified that he did not inform Trenda that he had no right to counsel. This is yet another inconsistency in the "credible" testimonies of both Officer [Evangelista] and Trenda, as opposed to the "incredible difference" in Larson's testimony. It is undisputed, however, that Trenda stated that he wanted to speak to a lawyer.

The above paragraph is a misrepresentation of the record. Trenda testified in relevant part as follows:

> Q. And did he ask you to give -- to submit to a field sobriety test?
>
> A. Yes.
>
> Q. And what did you say?
>
> A. I said, yes, I would do it, I just asked him if -- I wasn't sure what my rights were and if I had the right to call a lawyer before I submitted to the field sobriety test or not.
>
> Q. Did he respond.
>
> A. He said, no, that I didn't have the right to call a lawyer before I submitted to this test or not. Then, he asked me would I still take the test and I said, yes, I didn't have the right to call my lawyer.
>
> Q. Okay. So then what happened?
>
> A. So then, he pulls out his little pen light. I believe he had his big flashlight with him, he just kind of maybe put that under his arm to hold it and then he pulled out his pen light and told me to focus on the light and follow the light with my eyes without turning my head, and just follow it with my eye.

The issue raised by Trenda with regard to the right of counsel is described by him as follows:

> Where an arrested person asserts a belief that he is entitled to consult with counsel before submitting to testing for DUI, the police officer must explain that the person has no right to consult with counsel under Hawaii law. See State v. Taniguchi, 72 Haw. 235, 815 P.2d 24 (1991). . . . [T]he Court's conclusion that Hawaii law does not require Miranda warnings in this situation, in the absence of any reference to Taniguchi requirements that information be provided, or any argument by

Trenda during the hearing that a Miranda violation had occurred, is plain error.

In Taniguchi, the Hawai‘i Supreme Court held that "[w]here an arrested person asserts a belief that he is entitled to consult with counsel before submitting to a breath or blood test under Hawaii's [Hawai‘i's] implied consent law, the officer must explain that the person has no right to consult with counsel under Hawaii [Hawai‘i] law." Taniguchi, 72 Haw. at 239, 815 P.2d at 24. We conclude that the Taniguchi requirement was satisfied in this case.

7.

Trenda contends that FOF no. 21 "is clearly erroneous because it is based solely on the Court's questioning as an advocate for the State in violation of Trenda's right to an impartial judge." He argues that the "trial court acted as prosecutor throughout the hearing on [Trenda's] motion, thereby depriving [Trenda] of his due process right to a fair hearing before an impartial judge." On appeal he raises the question of "[w]hether the trial court improperly acted as prosecutor by questioning the police officer as to his experience in determining a correlation between HGN tests and blood alcohol tests, and by in other ways depriving Defendant of his due process right to a fair hearing?"

With respect to Trenda's point on appeal and FOF no. 21, the court, at the conclusion of the initial questioning

of Officer Evangelista by the attorneys, asked Officer Evangelista about the "horizontal gaze nystagmus test" and his experience of its reliability. Trenda contends that "[t]he prosecutor hardly could have done it better, but had omitted doing so on direct examination of Officer [Evangelista]."

We have stated that

> [u]ndeniably, "a trial judge has the right to examine witnesses to elicit pertinent material facts not brought out by either party or to clarify testimony" as incident to his or her truth-seeking power. [State v.] Hutch, 75 Haw. [307] at 327, 861 P.2d [11] at 21. This proposition is buttressed by Hawaii [Hawai'i] Rules of Evidence Rule 614(b) (1985) which states that, "The court may interrogate witnesses, whether called by itself or by a party." Understandably, there may be times in a trial when seemingly relevant points are not explored by counsel and counsel's failure to do so will be frustrating to the trial court. But, there are limits to the extent to which a trial court may insert itself into the proceedings.
>
> Accordingly, "[t]he power or discretion of a trial judge to question a witness is not unlimited or unbounded[.]" State v. Schutter, 60 Haw. 221, 222, 588 P.2d 428, 429 (1978) (per curiam) (quoting 81 Am.Jur.2d Witnesses § 419, at 426 (1976) (Am.Jur.)). For, "[w]hile the mere fact that the judge examines a witness at some length is not necessarily improper, it is improper for a judge to conduct an unduly extended examination of any witness." Id. (quoting 81 Am.Jur. § 419, at 426-27). When the court questions witnesses in a jury trial, "the judge should not by . . . his [or her] questioning indicate . . . [an] opinion as to the merits of the case," to avoid creating jury bias for one side or the other. Id. at 222-23, 588 P.2d at 429 (quoting 81 Am.Jur. § 419, at 427). In a jury-waived trial, the particular danger of jury bias is absent and so "the judge is accorded considerably greater discretion in the questioning of witnesses in jury-waived trials[.]" Hutch, 75 Haw. at 326 n.8, 861 P.2d at 21 n.8.
>
> Nevertheless, "[t]he judge should not assume the role of an advocate for either party[.]" Schutter, 60 Haw. at 223, 588 P.2d at 429 (quoting 81 Am.Jur. § 419, at 427) (court's examination of witness in jury-waived trial excessive). This caution is all the more important in a jury-waived trial where the court acts both as the judge of the law and as the judge of the facts. When the trial judge fails to act impartially and takes on the role of the prosecutor, the resulting conviction will be reversed. [Territory v.] Van Culin, 36 Haw. [153] at 162-63 (defendant deprived of fair trial when judge takes on the role of prosecutor). A judge takes on the role of the prosecutor when he or she conducts a "rigorous, persistent and extensive interrogation" of a witness, eliciting testimony which "tends to discredit the theory of the defense

. . . with questions normally identified with a prosecutor[.]" Id. at 160.

State v. Silva, 78 Hawai'i 115, 118, 890 P.2d 702, 705 (App. 1995). We conclude that the court did not take on the role of the prosecutor in this case.

8.

Trenda contends that, in the following instances, the court deprived him of his due process right to a fair hearing before an impartial judge:

(a) The discussion quoted above pertaining to Trenda's intent to plead no contest if he lost on his motion to suppress.

(b) At the conclusion of the questioning of Larson by the attorneys, the court asked him, "Mr. Larson, how long did you work for Mr. Trenda?" and Larson answered, "About five months." Trenda contends that "[t]his question has no relevance other than to impeach the witness by showing bias, motive or interest."

(c) The plausible explanation for the trial court's finding of "glaring inconsistency" between Larson's testimony and alleged consistent testimonies of Officer [Evangelista] and Trenda is that the trial court was acting as prosecutor, and this was not a fair hearing.

(d) The discussion quoted above pertaining to "the odor of intoxicating beverage."

(e) The following statement by the court at the conclusion of the hearing:

> I will note that it's not very often we hear these motions, most of the time they're fairly clear cut in this Court. So they're fairly clear cut when one is filed and if the State sees one that there is a clear issue that evidence should be suppressed, they usually fold on the issue and agree to the suppression, but this is a contested motion. So I will make findings on this motion.

Trenda asserts that "the trial court showed bias prior to making findings and conclusions by stating that motions such as this were unusual because if a valid issue was presented, the prosecutor normally would "fold" rather than go forward." We disagree with Trenda's interpretation.

Furthermore, Trenda contends that "the trial court was rude, demeaning, shrill, and plainly biased from the outset." Although the videotape is not a part of the appellate record, Trenda asserts that "[w]ithout the videotape, the cold transcript cannot convey how early nor how often the tone of voice during these admonitions clearly was intended to intimidate defense counsel. This effort failed."

Trenda contends that "it was clear, from the outset of proceedings to their foregone conclusion, that he did not receive a fair hearing before an impartial judge."

Upon a review of the record, we conclude that the judge in Trenda's case did not fail to act impartially.

CONCLUSION

Accordingly, we affirm the district court's May 4, 1999 Order Denying Defendant's Motion to Suppress.

DATED: Honolulu, Hawai‘i, September 25, 2000.

On the briefs:

Michael M. McPherson
for Defendant-Appellant.

Janet R. Garcia,
Deputy Prosecuting Attorney,
County of Hawai‘i,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge