IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellant,

vs.

AUGUST CASTRO CUNDIFF,
Defendant-Appellee.

Supreme Court Case No.: CRA05-005
Superior Court Case No.: CF0041-05

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on March 20, 2006
Hagåtña, Guam

For Plaintiff-Appellant:
Alisha L. Molyneux, *Esq.* (briefed)
Marianne Woloschuk, *Esq.* (argued)
Assistant Attorneys General
Office of the Attorney General
287 W. O'Brien Dr.
Hagåtña, GU 96910

For Defendant-Appellee:
Richard S. Dirkx, *Esq.*
Assistant Public Defender
Public Defender Service Corp.
110 W. O'Brien Dr.
Hagåtña, GU 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice.

TYDINGCO-GATEWOOD, J.:

[1] Plaintiff-Appellant People of Guam appeal from a Superior Court Decision and Order granting a motion to suppress evidence filed by Defendant-Appellee August Castro Cundiff in this criminal case. The court affirms in part, and reverses in part, the trial court's order.

I.

[2] The following facts were adduced at a hearing on Cundiff's Motion to Suppress Evidence, conducted on May 26, 2005 and continued to May 27, 2005. The only testimony provided was from Guam Police Department Officers Andrew Atoigue and Jude Ascura.

[3] On February 6, 2005, about 6:00 a.m., police officers responded to a report of a robbery in progress at the Sugo' Naya game room in Agat, Guam. The victim, Rory Surigao,[1] was an attendant at the game room. Officer Ascura interviewed Surigao at the scene, and testified that Surigao said he was held at knife point and robbed of $180. Surigao also told Officer Ascura said that his assailant frequented the game room. Surigao had described his assailant to Officer Ascura as a "male Guamanian . . . known as 'August,' to him, First name, August." Transcript of Proceedings ("Tr.") at 8 (Cont'd Mot. to Suppress, May 27, 2005). Surigao also told Officer Ascura that "August" was with another person, "Andrew," on the day of the robbery.

[1] The Indictment identified the victim as "Rory V. Surigao." Appellant's Excerpts of Record ("ER"), Tab 1 (Indictment). During the suppression hearing, Officer Jude Ascura, who interviewed the victim after the incident, testified that the victim was "Rory Serengau." Transcript ("Tr.") at 13 (Cont'd Mot. to Suppress, May 27, 2005). It would appear that the discrepancy in the spelling of the victim's surname may be the result of difficulty in pronouncing the name, or simply a mispronunciation. Using the transcript of the suppression hearing does not assist us, as Officer Ascura was not asked to spell the name during the suppression hearing. At any rate, neither the People nor Cundiff have raised this inconsistency in this appeal, and there is no allegation that the victim was incorrectly identified.

[4] According to Officer Ascura, Surigao did not give "August's" last name, and the surname "Cundiff" did not come up in the initial interview of Surigao. Instead, the surname "Cundiff" came from Officer R.J. Santiago, the desk watch officer at the Agat Precinct, at some point after the interview of the victim. Officer Ascura testified that Officer Santiago had advised "that he had knowledge of an August, whose last name was Cundiff, who fit the description." Tr. at 10 (Cont'd Mot. to Suppress). According to Officer Ascura's testimony, Officer Santiago said that "279 San Vicente Street, in Agat" was the address for "August Cundiff." Tr. at 15 (Cont'd Mot. to Suppress). Officer Ascura testified that an All Points Bulletin was then issued, because with a suspect and a "first-name basis description," that "it's good enough to put out an A.P.B." Tr. at 19 (Cont'd Mot. to Suppress).

[5] Officers Ascura and Atoigue proceeded to the San Vicente Street address, and spoke to Rosario Castro, Cundiff's mother. Officer Atoigue testified that they "gave the mother the full name" when speaking to her. Tr. at 9 (Mot. to Suppress). He further testified that "[s]he said that he doesn't stay there, he stays at another address which is just right down the street from Sugo' Naya," specifically, "229 North Perino Street, Agat." Tr. at 9 (Mot. to Suppress).

[6] Officer Andrew Atoigue testified that he, with Officers Ascura and O.J. Mendiola, went to the North Perino address and "were going to inquire if in fact he – August Cundiff resided there." Tr. at 20 (Mot. to Suppress May 26, 2005). At the suppression hearing, Officers Ascura and Atoigue presented somewhat contradictory testimonies regarding their contact with the occupants of the North Perino Street residence, namely, Brian Torres and Francine Dudkiewicz. According to Officer Atoigue, upon approaching the residence, he spoke to two people in the front yard, who were later identified as Torres and Dudkiewicz. Officer Atoigue testified that he "inquired if August was there, August Cundiff and Andrew Dudkiewicz, and they said, 'Yes, they're in the room.' So we

asked them for consent to search in reference to the robbery, they let us go. They gave us consent to go in, so we went in." Tr. at 9-10 (Mot. to Suppress). Officer Ascura's testimony, on the other hand, did not expressly state that Francine Dudkiewicz was present. He testified that he and other officers had spoken only to Torres, and told him that they were "looking for an August Cundiff. . . . We asked him if we could enter the residence, he said yes." Tr. at 16 (Cont'd Mot. to Suppress).

[7] Officers Atoigue, Ascura and Mendiola entered the residence. Officer Atoigue testified that when he walked up to the door, he was carrying a shotgun at the "[h]igh ready," that is, aiming the gun. Tr. at 24, (Mot. to Suppress). He further described the scene as follows:

> When we entered the room – the livingroom [sic] area, August was coming out of the room, so, of course, I held him at bay and told him, "Guam Police. Get on the ground." And then I inquired from him who he was, he said his name was August. And I asked him his last name, he say, "Cundiff."

Tr. at 10 (Mot. to Suppress). Cundiff was then placed in handcuffs. Officer Atoigue further testified that when asked about Andrew's whereabouts, Cundiff indicated that Andrew "was inside the room that he came out of. So we went in there and then Officer Mendiola at the time secured [Andrew] in handcuffs." Tr. at 10 (Mot. to Suppress). Officer Ascura also testified that the bedroom "belonged basically to Andrew," however, the record is unclear as to how he obtained this knowledge. Tr. at 17 (Cont'd Mot. to Suppress).

[8] According to Officer Ascura, he asked Andrew for permission to search the bedroom, and Andrew agreed. Officer Ascura testified that he "just searched the room, looked under the bed, (indiscernible) basic search, looked into the closet." Tr. at 28 (Cont'd Mot. to Suppress). He testified that a "small pocketknife . . . on some clothes on a small ironing board," was found in the room. Tr. at 16 (Cont'd Mot. to Suppress). Officer Ascura further described the search that occurred after the two men had been handcuffed:

A. [by Officer Ascura]	I made a check, an area check, at which time the small pocketknife was located, the black bicycle, and the victim's pouch.
	. . . .
Q. [by counsel]	How did you find those items? Did you get a search warrant to find those items?
A.	No. We asked the – again, Mr. Torres, if we could make a check around the residence.
Q.	And what did he tell you?
A.	He said yes.
Q.	So did you have a consent to search the house?
A.	Yes.

Tr. at 16 (Con't Mot. to Suppress). Specifically, Officer Ascura testified that the officers had recovered a "bicycle [that] was in the garage area, and the pouch [which] was in some heavy vegetation area behind the residence." Tr. at 16 (Cont'd Mot. to Suppress).

[9] Officer Atoigue testified that he transported August to the police station, purportedly for further questioning, but Andrew was tranported by another officer. Both August and Andrew were in handcuffs at the North Perino Street residence, when they were being brought to the station, and when they were removed from the patrol car. Tr. at 35 (Mot. to Suppress). Cundiff was advised of his rights at about 7:40 a.m., which he waived, and made a statement denying any involvement in the robbery of Surigao.

[10] Officer Atoigue testified that Cundiff told him that "he was at the Sugo' Naya game room with Andrew until about 3 a.m. . . . He said he was operating a black bicycle. . . . He wanted to take it inside because the owner said that things were getting stolen, so he wanted to bring it into the game room." Tr. at 15-16 (Mot. to Suppress). Although specific details are unclear from the hearing

transcripts, it appears that at some point, Surigao was at the precinct and identified Cundiff as his assailant. Tr. at 39 (Mot. to Suppress). Cundiff was then arrested "after his interview, because of the testimony of the witness [Surigao] and evidence." Tr. at 17 (Mot. to Suppress).

[11] After Cundiff made this statement and was arrested, Officer Atoigue testified that he and "all the other officers . . . were getting all the evidence together . . . All these items that were located, we left it there [at North Perino Street], had it all photographed by the Crime Lab and all that." Tr. at 41 (Mot. to Suppress). Cundiff then made another statement, about 10:30 a.m., " regarding what he did and where all the items were, [and police] later found it." Tr. at 17-18, 40 (Mot. to Suppress). According to Officer Atoigue, Cundiff's "second statement . . . said that he was there [at the gameroom] at 6 a.m. with Andrew, that he did intend on robbing or taking the pouch away from Rory, the attendant." Tr. at 16 (Mot. to Suppress). That same day, Cundiff was brought back to the North Perino Street residence by police, because Cundiff had told police that the "money was stashed in a backpack," apparently referring to the pouch that had been found earlier in the bushes behind the North Perino Street residence. Tr. at 43, 46 (Mot. to Suppress). There was no money inside the pouch. Police also searched the room inside the residence, which was purportedly Andrew's room, and found glass pipes which Cundiff identified as ice pipes, but which he denied owning. Tr. at 47 (Mot. to Suppress).

[12] The People obtained an Indictment against Cundiff, charging him with Second Degree Robbery (As a 2nd Degree Felony), with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; Third Degree Robbery (As a 3rd Degree Felony); Possession of Amphetamine-based Controlled Substance (As a 3rd Degree Felony); and Monetary Theft and Assault as Misdemeanors. Cundiff filed a Motion to Suppress on May 6, 2005, and the People filed an Opposition on May 17, 2005. The trial court held hearings on the motion on May

26 and 27, 2005. On June 3, 2005, the court granted the motion to suppress. *See* Appellant's Excerpts of Record ("ER"), Tab 2 (Decision and Order). The People timely appealed from the trial court's suppression of evidence.

II.

[13] Orders granting motions to suppress may immediately be appealed by the government. 8 GCA §§ 130.20(a)(6) and 130.40 (2005); 7 GCA § 3107(b) (2005).

III.

[14] "We review a trial court's decision on a defendant's motion to suppress evidence *de novo*." *People v. Chargualaf*, 2001 Guam 1 ¶ 12. "The trial court's factual findings are reviewed for clear error." *People v. Hualde*, 1999 Guam 3 ¶ 19 (citing *United States v. Noushfar*, 78 F.3d 1442, 1447 (9th Cir. 1996)). "Issues of statutory interpretation are reviewed *de novo*." *People v. Flores*, 2004 Guam 18 ¶ 8 (quoting *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10).

IV.

[15] This appeal involves the People's challenge of the trial court's suppression of evidence, including physical objects from the North Perino Street residence and statements from Cundiff. The issue requires that this court interpret 8 GCA § 20.35 (2005) regarding the statutory formalities of an arrest, the "Stop and Frisk" Statutes found at Chapter 30 of 8 GCA, and the consent exception to the warrant requirement.

[16] The People argue that suppression was improper because the failure to comply with statutory formalities of an arrest should not result in the suppression of evidence. Alternatively, the People argue that the police officers had probable cause to arrest Cundiff. The People also maintain that Cundiff must provide a nexus between the first (exculpatory) and second (inculpatory) statement in order for the second statement to be suppressed. The People next argue that the trial court erred in

applying the Stop and Frisk statutes, found at Chapter 30 of 8 GCA. Finally, the People maintain that even without a warrant, the searches were nonetheless valid because of exigent circumstances and consent was obtained.

[17] Cundiff counters each argument. He maintains that the officers had no probable cause, and although Guam's "Stop and Frisk" statutes allow for brief detentions without probable cause, the officers' actions went beyond any conduct acceptable by law. Cundiff next argues that where there is a warrantless seizure or search based on consent, the People bear the burden of proof that consent to search was freely and voluntarily given. *People v. Santos*, 1999 Guam 1 ¶ 33 (Siguenza, J.). He argues that the searches here were unlawful because there was no lawful arrest, no probable cause, and any consent given was invalid as to the bedroom.

A. Lawful Arrest

1. Definition of "arrested"

[18] We first examine whether Cundiff was arrested at N. Perino St.. Guam law defines an arrest as follows: "An arrest is made by an actual restraint of the person, or by submission to the custody of the person making the arrest. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention." 8 GCA § 20.10 (2005). Both Officer Atoigue and Officer Ascura testified that Cundiff was not arrested until he was at the police precinct, and they repeatedly characterized their control over Cundiff as merely detention for questioning. The testimony they gave at the suppression hearing, however, contradict their assertions.

a. "Actual restraint"

[19] Despite the officers' testimony and belief that they had only detained Cundiff, a review of their actions at North Perino Street shows that there was "actual restraint" of Cundiff, as defined by 8 GCA § 20.10. Officer Ascura testified that after "August . . . was instructed to lay on the ground,

[Office Ascura] quickly replaced him in hand restraints (sic)."[2] Tr. at 18 (Cont'd Mot. to Suppress, May 27, 2006). Similarly, Officer Atoigue testified that when the man who came out of the bedroom of the North Perino Street residence "said he was August," then another officer "secured him in handcuffs." Tr. at 28 (Mot. to Suppress, May 26, 2006). The officers' testimonies concur that Cundiff had been placed in handcuffs at the North Perino Street residence. Their testimony reveals that Cundiff was actually restrained and thus, was indeed arrested in accordance with the definition set forth in 8 GCA § 20.10.

b. A person's belief that he is "not free to leave"

[20] As discussed above, physical restraint has been interpreted as an arrest. *Sibron v. New York*, 392 U.S. 40 (1968). "When the policeman grabbed [the suspect] by the collar," [the officer] abruptly 'seized' him and curtailed his freedom of movement . . . . " *Id.* at 67. Testimony that Cundiff was not under arrest is belied by the fact that he was handcuffed at North Perino Street; this physical restraint of Cundiff "curtailed his freedom of movement." *Id.*

[21] An arrest may also occur even if police have not formally arrested the person, or if there is no physical restraint. The United States Supreme Court has long held that "[a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

[22] The facts of instant case parallel the facts in *Dunaway v. New York*, 442 U.S. 200 (1979), where police, without probable cause, took the defendant into custody, transported him to the police station and detained him for interrogation. *Id.* at 216. The Court held that the police officers' actions were unconstitutional, and held that "detention for custodial interrogation – regardless of its

[2] According to Officer Atoigue's testimony, Officer O.J. Mendiola had placed handcuffs on August. *See* Tr. at 10 (Mot. to Suppress).

label – intrudes so severely on interests protected by the Fourth Amendment . . . [that such] trigger[s] the traditional safeguards against illegal arrest." *Id.*

[23] Here, Officers Atoigue and Ascura testified that Cundiff was not arrested until he was at the police precinct. However, Officer Ascura testified that once Cundiff was handcuffed, Cundiff was not free to leave. *See* Tr. at 18 (Cont'd Mot. to Suppress). Officer Atoigue also testified that: "Ever since [Cundiff] was secured and identified, he was not allowed to go anywhere. He was detained." Tr. at 17 (Mot to Suppress). It is undisputed that Cundiff was placed in handcuffs, placed in a police vehicle, and escorted to the police station, where he was interrogated by Officer Atoigue. From the officers' testimonies, a reasonable person in Cundiff's position would believe that he was not free to leave, either from the North Perino Street residence or from the police station.

[24] We agree with the trial court that the arrest in this case occurred at the moment Cundiff was physically restrained when placed in handcuffs at the North Perino Street residence. The prosecutor even conceded this during the hearing on the motion to suppress, stating that Cundiff "was basically arrested because he was restrained." Tr. at 37 (Cont'd Mot to Suppress). It is undisputed that the officers did not obtain a warrant to arrest Cundiff.

2. Probable Cause

[25] Having determined that Cundiff was arrested at North Perino Street, we must next examine whether there was probable cause to support the arrest. Without probable cause, the officers' conduct is unconstitutional. *See Dunaway*, 442 U.S. 200.

[26] It is undisputed that the police officers did not obtain a warrant to arrest Cundiff. A search or seizure made without a warrant is per se unreasonable unless it falls within the specifically established and well delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). The Court has articulated the following rule when examining the constitutionality of the police officers'

search or arrest in a situation as here:

> The constitutional validity of the search in this case, then, must depend upon the constitutional validity of the [defendant's] arrest. *Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense*.

Beck v. Ohio, 379 U.S. 89, 91 (1964) (emphasis added).

[27] Determining the existence of probable cause requires determining whether officers had "reasonably trustworthy information." We do not believe, based on the evidence adduced at the suppression hearing, that the People have satisfied its burden to prove that the officers had probable cause to arrest Cundiff.

[28] According to Officer Ascura, Surigao's initial identification of his assailant was "a male Guamanian . . . known as 'August,' to him." Tr. at 8 (Mot. to Suppress). From this information, the investigating officers then were notified by Officer Santiago at the precinct desk watch, of a person who "fits the description." Tr. at 8 (Mot. to Suppress). Officer Santiago stated that he "had knowledge of an August, who's [sic] last name is Cundiff, and [who] resides at an address in Agat. . . ." Tr. at 10 (Cont'd Mot to Suppress). We are concerned by the record regarding the description of Surigao's assailant. Although there is testimony of a person "fit[ting] the description," it does not appear that any detailed description, other than "a male Guamanian" was given. See Tr. at 8 (Cont'd Mot to Suppress). Such a description is essentially no description at all. Furthermore, Surigao was only able provide a first name; without more, this description falls far short of "reasonably trustworthy information." *Beck*, 379 U.S. at 91.

[29] Additionally, the officers' testimonies reveal that they were unsure whether Cundiff was the person identified by Surigao as his assailant. Officer Atoigue, the primary officer, testified that even

with the information given by Surigao and Officer Santiago regarding the person identified as "August," the officers were "not too sure if it's him." Tr. at 9 (Mot. to Suppress). This lack of clear identification is apparent in Officer Ascura's testimony when questioned about regarding the need for a warrant:

> Q. [by prosecutor] Okay. After you took this complaint did you obtain an arrest warrant?
>
> A. [by Officer] No.
>
> Q. And why didn't you?
>
> A. After I took this complaint, it still was investigated. *At the time we didn't know much more of August, who he was, until later*.
>
> . . . .
>
> A. We didn't have a reason to obtain a search warrant; *we didn't know who we were looking for at that point*.

Tr. at 15 (Cont'd Mot. to Suppress) (emphases added).

[30] Finally, there is some question regarding whether the "armed" robbery even occurred. Officer Ascura, who interviewed Surigao, testified as to Surigao's description of the incident:

> That earlier that morning, around 6:05, at the game room, the defendant, August, wanted his game cashed out, and [Surigao] gave August his money, at which time . . . August had grabbed his pouch, and told him that, you know, 'I'm going to rob you. Give me the money.' The victim . . . pushed his hand away, told him, 'Stop f------ around,' at which time he felt something sharp to the right side of his stomach, looked down, and saw a . . . small pocketknife with a black handle, held by August.
>
> August had a friend, Andrew, who was telling him to stop, put the knife away . . . .

Tr. at 13 (Cont'd Mot. to Suppress). Officer Ascura testified that Surigao told him that Cundiff had indeed "put the knife away." Tr. at 20 (Cont'd Mot. to Suppress). Furthermore, when Officer Ascura was asked whether "at the time the pouch was taken, there was no knife involved, right?" Officer Ascura responded, "Not at that point." Tr. at 21-22 (Cont'd Mot. to Suppress).

[31] The officers' testimonies as a whole reveal that they were not sure as to the identity of the perpetrator, and that they did know who they were looking for. The description provided by the victim was only a first name, "August." Although admittedly an uncommon name, the combined information of the name "August" and a description of "a male Guamanian" who frequented the game room is insufficient and inadequate to be considered "reasonably trustworthy information" which would "warrant a prudent man in believing" that Cundiff had committed the robbery. *Beck*, 379 U.S. at 91.

[32] We hold that there was no probable cause to support Cundiff's arrest, and thus, the arrest was unlawful. In so holding, we specifically decline to adopt the trial court's rationale for suppressing the evidence, which we address next.

B. Statutory Formalities of an Arrest

[33] We next examine the trial court's rationale for suppressing evidence, as its primary focus was on 8 GCA § 20.35 (2005), which states:

> **§ 20.35. Formalities in Making Arrest; Exceptions.**
>
> (a) The person making an arrest shall inform the person to be arrested of the intention to arrest him, the offense for which he is being arrested, and the authority permitting the person to make the arrest.
>
> (b) Subsection (a) shall not apply when the person making the arrest has reasonable cause to believe that the person to be arrested is engaged in the commission of an offense, or the immediate flight therefrom, until the arrest has been completed.

The court held that the formalities of arrest required by section 20.35 were "absolute requirements," and because the police officers had failed to comply with the statutory requirements, consequently, the arrest of Cundiff was unlawful. The trial court further concluded that there was no intervening event to purge the taint of the unlawful arrest, thus, the fruit of the poisonous tree doctrine applied and required the suppression of evidence gathered as a result of the unlawful arrest and detention.

[34] The interpretation of section 20.35 is an issue of first impression for this court. The source of the Guam statute is California Penal Code § 841.[3] *See* Foreword (1953) *in* Penal Code of the Territory of Guam (1970). This court may "look to the substantial precedent developed within that state to assist in interpreting parallel Guam provisions." *People v. Superior Court (Laxamana)*, 2001 Guam 26 ¶ 8. Therefore, we look to California court decisions to assist us in interpreting parallel Guam statutes.

1. Subsection (a)

[35] We examine the trial court's holding, which Cundiff agrees should be upheld, that the failure to strictly comply with the formalities found in 8 GCA § 20.35 requires the suppression of evidence obtained pursuant to such arrest. The California Supreme Court, in disagreement with the trial court's interpretation and Cundiff's position, has held:

> If the officer has reasonable couse [sic] to make an arrest, a violation of section 841 would be unrelated and collateral to the securing of evidence by a search incident to the arrest, for what the search turns up will in no way depend on whether the officer informed 'the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it.'

People v. Maddox, 294 P.2d 6, 9 (Cal. 1956) (citing Cal. Pen. Code § 841). This holding is reiterated in *People v. Hall*, 396 P.2d 700, 702 n.5 (Cal. 1964), when the court stated that "[s]uch

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[3] California Penal Code § 841 states:

> **§ 841. Formalities in making arrest; exceptions.**
> The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, or after an escape.
>
> The person making the arrest must, on request of the person he is arresting, inform the latter of the offense for which he is being arrested.

Cal. Pen. Code § 841 (Westlaw, through Ch. 11 of 2006 Reg. Sess. urgency legislation).

a violation [of section 841], however, is not a ground for excluding evidence obtained after an otherwise lawful arrest." Therefore, if there is an otherwise lawful arrest, the failure to strictly comply with the statutory requirements for an arrest does not necessitate suppression of evidence.

[36] We decline to adopt the trial court's interpretation that the failure to comply with statutory requirements of an arrest pursuant to section 20.35(a) would necessitate the suppression of evidence. Although in the instant case, we agree with the trial court that the evidence must be suppressed, we disagree with the trial court's conclusion that the statutory formalities of an arrest set forth in section 20.35(a) are "absolute requirements" and the failure to comply with these requirements is an unlawful arrest which constitutes grounds for the suppression of evidence. Appellant's ER, Tab 2 (Decision and Order). Rather, we agree with the interpretation of the California Supreme Court, and hold that if there is an otherwise lawful arrest, a violation of the statutory requirements of an arrest under 8 GCA § 20.35(a) does not automatically result in the suppression of evidence.

2. Subsection (b)

[37] Separate from our holding above regarding subsection (a), we next address the trial court's analysis regarding whether Cundiff's arrest "properly fit within the circumstances under which subsection (b) should be utilized." Appellant's ER, Tab 2 at 5 (Decision and Order). Under 8 GCA § 20.35(b), the statutory requirements of subsection (a) do not apply when an officer has "reasonable cause to believe that the person to be arrested is engaged in the commission of an offense, or the immediate flight therefrom." In short, if an officer has reasonable cause to believe a person is committing or fleeing from a crime, the officer may comply with the statutory formalities of subsection (a) after the suspect has been arrested.

[38] We agree with the trial court that the record is devoid of any indication that a crime was committed (and there is no allegation that it was committed) in the presence of a police officer. It

is not apparent, however, that officers must be in "hot pursuit" of a suspect; the statute requires only that the suspect be in the "immediate flight" from the commission of a crime. 8 GCA § 20.35(b). In this case, the robbery at Sugo' Naya was reported about 6:00 a.m. and police arrived at the North Perino Street home about 7:00 a.m. Although there is a difference of only about one an hour, it is not clear that Cundiff was immediately fleeing the crime scene. Because Cundiff was neither engaged in the commission of an offense, nor was he immediately fleeing from the crime scene, subsection (b) is inapplicable and the plain words of the statute require that the officers comply with the formalities set forth in subsection (a). Our agreement with the trial court is limited to this precise issue. As discussed above, we agree that the evidence was properly suppressed, but do not believe that 8 GCA § 20.35(a) set forth absolute requirements, such that the failure to strictly comply results in the automatic suppression of evidence.

C. "Stop and Frisk" Statutes, Chapter 30 of 8 GCA

[39] We next address Cundiff's argument that the "Stop and Frisk" statutes, codified at Chapter 30 of 8 GCA, apply to the instant case. According to 8 GCA § 30.10 (2005), "Whenever a peace officer encounters any person under circumstances which reasonably indicate that such person has committed, is committing or is about to commit a criminal offense, the peace officer may detain such person." Such detentions, however, are limited to 15 minutes, and "shall not extend beyond the place where it was first effected or the immediate vicinity thereof." 8 GCA § 30.30 (2005). Moreover, the stop "shall be for the purpose of ascertaining the identity of the person detained and the circumstances surrounding his presence abroad which lead the officer to believe that he had committed, was committing, or was about to commit a criminal offense, but such person shall not be compelled to answer any inquiry of the peace officer." 8 GCA § 30.20 (2005).

> The trial court, in its Decision and Order, recognized Cundiff's reliance on:
>
> > statutes that govern situations where individuals are not arrested but instead are detained "for the purpose of ascertaining the identity of the person and the circumstances surrounding his presence abroad which lead the officer to believe that he has committed, was committing, or was about to commit a criminal offense. . . ."

Appellant's ER, Tab 2 at 6 (Decision and Order) (quoting 8 GCA § 30.20)). The trial court, however, did not rule on whether the "Stop and Frisk" statutes applied, having found that arrest infirm on other grounds. *See* Appellant's ER, Tab 2 (Decision and Order)

[40] Police officers may conduct an investigatory stop as "[t]he Fourth Amendment permits brief detentions when a police officer has a reasonable suspicion that an individual was engaged in or is about to be engaged in illegal conduct." *People v. Johnson*, 1997 Guam 9 ¶ 4 (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)). Contrary to Cundiff's assertion, the Stop and Frisk statutes, codified at Chapter 30 of 8 GCA do not apply to the facts of the case at bar, because the contact between the officers and Cundiff was not an investigatory stop contemplated by the Stop and Frisk statutes. Officer Atoigue's testimony describes his actions upon entering the North Perino Street residence and seeing Cundiff: "I had my weapon right on him and I told him to get on the ground, 'Guam Police. Get on the ground,' and he got on the ground, we secured him. We asked him if he was August or Andrew, he said he was August, so we go ahead (sic) and secured him in handcuffs." Tr. at 28 (Mot. to Suppress). Pointing a weapon at a suspect, ordering him to the ground and securing him, goes beyond "ascertaining the identity of the person detained and the circumstances surrounding his presence abroad which lead the officer to believe that he had committed, was committing, or was about to commit a criminal offense." 8 GCA § 30.20. Such action cannot be interpreted as an investigatory stop; it is not a "brief detention" contemplated by this court in *Johnson*, 1997 Guam 9 ¶ 4. We reject any contention that the Stop and Frisk statutes apply to the circumstances here, hold, therefore, that the arrest of Cundiff at the North Perino Street residence was unlawful.

D. Warrantless Search of the North Perino Street Residence

1. Fruit of the poisonous tree doctrine

[41] Because we hold that Cundiff's arrest was unlawful, we next examine whether the evidence derived therefrom must be suppressed under the fruit of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. Santos*, 2003 Guam 1 ¶ 64 (Carbullido, J.) Before evidence may be suppressed under this doctrine,

> the court must initially resolve "whether the challenged evidence was come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Segura v. United States*, 468 U.S. 796, 804-05, 104 S.Ct. 3380, 3385 (1984) (alteration in original) (internal quotations and citations omitted). Subsequent statements made, even after an illegal arrest, are not automatically excluded if "intervening events break the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint." *Elstad*, 470 U.S. at 306, 105 S.Ct. at 1291 (internal quotations and citations omitted).

Santos, 2003 Guam 1 ¶ 65. The People have failed to present independent evidence, and we have found none, that would "break the causal connection" between Cundiff's unlawful arrest at the North Perino Street residence and the evidence obtained from the events at the police precinct. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). In this case, such evidence includes Cundiff's statements and the identification of Cundiff by Surigao. We therefore hold that because Cundiff was brought to the precinct as a direct result of the unlawful arrest, Cundiff's statements made at the precinct and the precinct identification by Surigao, are fruits of such unlawful arrest and are therefore suppressible.

2. Warrant requirement

[42] This court must next examine the admissibility of the items recovered at the North Perino Street residence, obtained through a warrantless search. "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth

Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978). "In the absence of a warrant, the police may lawfully conduct a search or seizure only if an exception to the warrant requirement applies." *Chargualaf*, 2001 Guam 1 ¶ 14. "The general rule that warrantless searches are presumptively unreasonable, however, is subject to certain well established exceptions . . . ." *People v. Camacho*, 2004 Guam 6 ¶ 16. Exceptions include voluntary consent to the search, *Santos*, 1999 Guam 1 ¶ 33, as well as police officers' good faith reliance on a defective search warrant and the plain view doctrine. *Camacho*, 2001 Guam 1 ¶ 16.

[43] The People argue that the warrantless searches were lawfully conducted, as there were exigent circumstances and that the officers had obtained consent. Because the trial court based its suppression on the officers' violation of 8 GCA § 20.35, it did not consider the exceptions to the warrant requirement. We believe that the trial court erred in failing to address these exceptions, and consider the People's arguments below.

a. Exigent circumstances exception to the warrant requirement

[44] We first address whether, as the People assert, there were exigent circumstances. The People contend that the case involved a violent crime and there was probable cause based on the victim's identification of Cundiff. We note that contrary to the People's contention, according to Officer Ascura's testimony, Surigao stated that Cundiff had put away the knife at the time the pouch was taken. Tr. at 21-22 (Cont'd Mot. to Suppress).

[45] Furthermore, in light of our holding herein that officers lacked probable cause to support Cundiff's arrest, we need not make the determination of whether the evidence presented by the officers at the suppression hearing articulate the existence of exigent circumstances. *See Santos*, 1999 Guam 1 ¶ 2 (declining to address "the issue of whether exigent circumstances existed at the time of the search" because "probable cause was never established."); *see also Kirk v. La.*, 536 U.S.

635, 638 (2002) ("As *Payton* [*v. New York*, 445 U.S. 573 (1980)] makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.").

b. Voluntary consent exception to the warrant requirement

[46] We next evaluate whether there was valid consent to search. "Voluntary consent is a recognized exception to the warrant requirement." *Chargualaf*, 2001 Guam 1 ¶ 14. Further,

> The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises.

Ill. v. Rodriguez, 497 U.S. 177, 181 (1990) (citations omitted).

[47] The People argue that police officers obtained consent from Cundiff himself, while he was in custody at the precinct, to return to the North Perino Street residence and conduct a search. Appellant's Brief, at 21 (Oct. 17, 2005). Because of our holding that the fruit of the poisonous tree doctrine results in the suppression of Cundiff's statements at the police precinct, it is unnecessary to discuss the consent purportedly given by Cundiff after his second statement, as such statements would similarly be suppressed.

[48] We next address the People's argument that Torres and Dudkiewicz, the occupants of the North Perino Street residence, gave valid consent to the search. Appellant's Brief at 21 (Oct. 17, 2005). It appears, from the officers' testimony, that there were two separate requests to search the premises. The first request was made when officers approached the residence. Officer Atoigue testified that "we asked [Brian Torres and Francine Dudkiewicz] for consent to search in reference to the robbery, they let us go. They gave us consent to go in, so we went in." Tr. at 9-10 (Mot. to Suppress). The second request was apparently after Cundiff and Andrew had been arrested, as

Officer Ascura testified that "[w]e asked the – again Mr. Torres, if we could make a check around the residence." Tr. at 16 (Cont'd Mot. to Suppress).

[49] The People bear the burden of proving, by a preponderance of the evidence, that consent was given voluntarily. *Chargualaf*, 2001 Guam 1 ¶ 25.

> [V]oluntariness is determined from the totality of the circumstances. . . . Factors in determining voluntariness include: 1) whether the defendant was detained and the length of time of the questioning; 2) whether the defendant was threatened or intimidated by the police; 3) whether the defendant relied on misrepresentations or promises made by the police; 4) whether the person was in custody or under arrest when the consent was given; 5) whether the person was in a public or a secluded place; and 6) whether the defendant objected to the search.

Id. (citations omitted). Looking at the totality of the circumstances, and upon evaluating each factor, it appears that the consent of Torres and Dudkiewicz was voluntary. Neither Torres nor Dudkiewicz were detained. There was no testimony presented that Torres or Dudkiewicz were threatened or intimidated by the police or that they relied upon misrepresentations or promises of the officers. Torres and Dudkiewicz were not in custody and not under arrest when they gave consent; they apparently were outside their home. Finally, there was no testimony that they objected to the search.

[50] Furthermore, there was no contention that the officers went beyond the scope of consent when they conducted their search. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Here, Officer Atoigue testified that he and other officers asked for "consent to search in reference to the robbery," Tr. at 9-10 (Mot. to Suppress, May 26, 2006). Officer Ascura testified that he asked if he "could make a check around the residence." Tr. at 16 (Cont'd Mot. to Suppress, May 27, 2006). Both requests were granted. It seems reasonable that, as a result, the officers could look around the North Perino Street home. According to Officer Ascura's

testimony, after Andrew was arrested, officers in the bedroom saw the pocketknife "on some clothes on a small ironing board." Tr. at 16 (Cont'd Mot. to Suppress). In addition, officers found a "bicycle [that] was in the garage area, and the pouch [which] was in some heavy vegetation area behind the residence." Tr. at 16 (Cont'd Mot. to Suppress). There is no testimony that Torres or Dudkiewicz imposed any limitations on their consent; rather, it appears that they gave consent for the officers to "check around" the home. Tr. at 16 (Cont'd Mot. to Suppress, May 27, 2006). Cundiff argues that Torres' consent was not effective as to entry into the room occupied by Cundiff and Andrew, based on Officer Ascura's testimony that the room "belonged basically to Andrew." Tr. at 17 (Cont'd Mot to Suppress, May 27, 2006). However, there was no clear testimony that the room was primarily and exclusively used by Andrew or Cundiff. A third party who has common authority over the premises may give consent to a search. *United States v. Matlock*, 415 U.S. 164, 171 (1974); *cf. Ga. v. Randolph*, – U.S. –, 126 S.Ct. 1515 (2006) (holding that the warrantless search of a home, based the consent of one occupant over the objection of a physically present co-occupant, is unreasonable and invalid as to the objecting co-occupant). Here, both co-occupants, Torres and Dudkiewicz gave voluntary consent to search the premises and therefore, the evidence derived therefrom – the pocket knife, the pouch, and the bicycle – are admissible.

V.

[51] We hold that, notwithstanding the testimony of the police officers, the arrest in this case occurred at the moment Defendant-Appellee August Castro Cundiff was placed in handcuffs at the North Perino Street residence. We further hold that in circumstances where there is an otherwise lawful arrest, the failure to strictly comply with the statutory requirements for an arrest pursuant to 8 GCA § 20.35(a) does not necessitate suppression of evidence. Finally, we hold that the testimony presented at the suppression hearing was insufficient to show that officers had probable cause to

arrest Cundiff. Therefore, the evidence derived therefrom, including Cundiff's statements at the precinct and the identification made by the victim, must be suppressed under the Exclusionary Rule as being fruits of the unlawful arrest. The physical evidence obtained at the home – the pocket knife, the pouch, and the bicycle – are admissible despite the warrantless search, as officers obtained voluntary consent to search the premises prior to recovering these items. Accordingly, the trial court is **AFFIRMED** in part, and **REVERSED** in part.