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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

KESNER RASAUO,
Defendant-Appellant.

OPINION

Cite as: 2011 Guam 1

Supreme Court Case No.: CRA09-006
Superior Court Case No.: CM0742-08

Appeal from the Superior Court of Guam
Argued and submitted on March 8, 2010
Hagåtña, Guam

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ORIGINAL

BEFORE: ROBERT J. TORRES, Chief Justice[1]; F. PHILIP CARBULLIDO, Associate Justice and KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.

[1] Defendant-Appellant Kesner Rasauo, a "citizen" of Chuuk but longtime resident of Guam, was convicted after a jury trial of two charges of drunk driving as a misdemeanor. Prior to trial, the Superior Court denied two defense motions that are the subject of this appeal: a motion to suppress various pieces of evidence due to a violation of Rasauo's *Miranda* rights, and a motion to dismiss, alleging that Rasauo's speedy trial rights were violated when the appearance date set by the Notice to Appear was more than one year from the initial date of the arrest, and the arraignment date was more than ninety days from the date the complaint was filed.

[2] For the reasons set forth below, we hold that Rasauo never validly waived his *Miranda* rights, but that any error in denying the motion to suppress was harmless. Furthermore, Rasauo failed to demonstrate prejudice from the pre-trial delay, and consequently his speedy trial claims fail.

[3] The judgment below is **AFFIRMED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

[4] On December 1, 2007, Officer D. R. Flickinger of the Guam Police Department greeted drivers, including Defendant-Appellant Kesner Rasauo, at a pre-scheduled and pre-announced sobriety checkpoint located on Route 1 in Tamuning, Guam. Officer Flickinger observed that Rasauo exhibited common indicators of alcohol intoxication, including an odor of alcohol, bloodshot watery eyes, and slurred speech. When the officer asked Rasauo if he had had anything to drink, Rasauo responded that he had two to four beers. The officer noticed that

[1] The signatures in this opinion reflect the titles of the Justices at the time this matter was considered and determined.

Rasauo spoke English slowly with an accent, but did not offer him the assistance of an interpreter, nor inquire into his ability to speak English.

[5] The officer asked Rasauo to step out of the car and submit to standardized field sobriety tests, which were administered in English. The tests in question were the horizontal gaze and nystagmus test, the one-legged stand, and the walk and turn.[2] At the tests' conclusion, the officer determined that Rasauo was under the influence and arrested him for Driving Under the Influence of Alcohol ("DUI").

[6] Rasauo was then brought to a DUI van at the checkpoint, where he was processed by Officer Julian Laxamana, who was responsible for advising Rasauo of his constitutional rights, administering testing pursuant to Guam's implied consent statute, and further interrogation. At the suppression hearing, Officer Laxamana testified that he explained to Rasauo his Constitutional rights paragraph by paragraph, using a standard Custodial Interrogation waiver form. When Rasauo had trouble understanding certain parts of the form, the officer attempted to provide clarification, and moved on when Rasauo indicated that he understood.

[7] Officer Laxamana also administered an implied consent form, which explained that, under Title 16 GCA 18201(a), any person who operates a motor vehicle on Guam roads is deemed to have consented to a blood, urine, or breath test. Rasauo signed the form in the place indicating that he should write his initial if he agreed to take a breath test. Afterward, Rasauo answered several basic questions in English about whether he was drinking and driving and where he was going at the time he was pulled over. The answers, as understood by Officer

[2] Officer Flickinger testified that Rasauo failed the tests, although he did not testify to the specific manner in which Rasauo failed. Asked on direct examination if Rasauo was arrested for DUI "because during the tests, he didn't—he wasn't able to meet the requirements," Officer Flickinger responded "That's correct." Tr., vol. II at 5 (Suppression Hr'g, Apr. 1, 2009).

Laxamana, were included in a Report of Alcohol Influence that was part of the evidence Rasauo sought to suppress

[8] Police booked and released Rasauo after having him sign a notice to appear ("NTA") in court on December 10, 2008, more than one year from the date of arrest. Nine months later, on September 4, 2008, the People filed the NTA and a complaint in the Superior Court of Guam. The People did not request a summons for an earlier date.

[9] When Rasauo did not show up for the December 10, 2008 hearing, the court issued a bench warrant. Rasauo was taken into custody two days later. *Id.* On December 17, 2008, the judge signed an order of conditional release and appearance bond. *Id.* Rasauo was not arraigned at this time, but instead was given the complaint, advised of the charges, advised of his rights and appointed a counsel with a continued arraignment date of December 24, 2008. On December 24, 2008, Rasauo appeared for his arraignment, pleaded not guilty and waived his right to speedy trial. Rasauo first asserted speedy trial on February 10, 2009

[10] On February 19, 2009, Rasauo filed separate pre-trial motions to dismiss and to suppress. The court held separate hearings on each motion at the end of March and in early April. In separate Decision and Orders filed in April 2009, the Superior Court denied both the motion to suppress and the motion to dismiss. Rasauo was convicted after a jury trial which commenced on April 9, 2009. The judgment of conviction was filed and entered on the docket and Rasauo timely filed this appeal.

[11] Throughout the motion hearings and trial, Rasauo testified through an interpreter, Mr. Johnny.

II. JURISDICTION

[12] The Supreme Court of Guam has jurisdiction of this appeal of a criminal conviction pursuant to 48 U.S.C.A. §1424-3(d) (Westlaw current through Pub. L. 111-311 (2011)); and 7 GCA §§ 3107(a) and (b) (2005); and 8 GCA §§ 130.10 and 130.15 (2005).

III. STANDARD OF REVIEW

[13] This court conducts *de novo* review of a denial of a motion to suppress. *People v. Sangalang*, 2001 Guam 18 ¶ 10. We review *de novo* the legal conclusions of the trial court, the voluntariness of a waiver of *Miranda* rights, and whether *Miranda* warnings were adequate. *People v. Farata*, 2007 Guam 8 ¶¶ 14 - 15.

[14] Both parties assert that the Superior Court's ruling on a motion to dismiss criminal charges should generally be reviewed under an abuse of discretion standard, except where the issues present purely legal questions. Appellant's Br. at 2 (Sept. 18, 2009), citing *People v. Rios*, 2008 Guam 22 ¶ 8; Appellee's Br. at 9 (Oct. 16, 2009). We have stated that we review for an abuse of discretion the denial of a motion to dismiss alleging a violation of the statutory speedy trial periods set forth in 8 GCA § 80.60. *People v. Flores*, 2009 Guam 22 ¶ 9. We have not previously set forth a standard of review for the grant or denial of a motion to dismiss alleging unnecessary delay in bringing a defendant to trial, in violation of 8 GCA § 80.70(b). Such alleged error will ordinarily be reviewed for abuse of discretion. *See United States v. Sears, Roebuck, & Co.*, 877 F.2d 734, 737 (9th Cir. 1988). We have also never set forth a standard of review for the grant or denial of a motion to dismiss alleging a violation of the guarantee to a prompt arraignment set forth in 8 GCA § 60.10(a). We have stated this provision is a statutory expression of the speedy trial right. *People v. Stephen*, 2009 Guam 8 ¶ 32. Consequently, we

will apply the same standard of review we apply to speedy trial claims brought under 8 GCA § 80.60.

IV. ANALYSIS

[15] Rasauo contends the trial court erred in denying his pre-trial motion to suppress and his pre-trial motion to dismiss. We consider each in turn.

A. Motion to Suppress

[16] The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V. It is applicable to criminal prosecutions in the Territory of Guam through our Organic Act. 48 U.S.C.A. § 1421b(d) (Westlaw current through Pub. L. 111-311 (2011)). Admissibility of any statement given during custodial interrogation depends on whether the police provided the suspect with four warnings:

> the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 479 (1996). A suspect informed of his Miranda rights may waive those rights, provided that the waiver is "voluntary, knowing, and intelligent." *U.S. v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998) (internal citations omitted). There is, however, a presumption against waiver. The burden rests on the government to prove a valid waiver by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

[17] Rasauo was born in Chuuk where he completed school up until the eighth grade. Although he remains a citizen of the Federated States of Micronesia, Rasauo has resided on Guam for thirteen years. He speaks English slowly and with an accent. Rasauo contends that, in light of his limited knowledge of English, he had a right to receive the *Miranda* warnings in a language he understood. He argues that Officer Laxamana's translation of one of the *Miranda*

warnings was incorrect and incomplete, and by implication, inadequate to result in a knowing and intelligent waiver.

1. Adequacy of *Miranda* warnings

[18] The adequacy of a *Miranda* warning is reviewed *de novo*. *Farata*, 2007 Guam 8 ¶15 (citing *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989)). *Miranda* warnings need not be a "virtual incantation of the precise language contained in the Miranda opinion." *California v. Prysock*, 453 U.S. 355 (1981). The warnings need not follow a strict format where it adequately conveys the substance of the rights involved. *See id.* at 359-60 (explaining that not only a verbatim *Miranda* warning, but also its functional equivalent, may provide the defendant with adequate notice of his or her rights). What *Miranda* requires is "meaningful advice to the unlettered and unlearned in language which [they] can comprehend and on which [they] can knowingly act." *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989) (quoting *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir. 1967), *cert. denied*, 389 U.S. 992 (1967)).

[19] *Miranda* is satisfied where, prior to the initiation of questioning, the police "fully apprise the suspect of the State's intention to use his statements to secure a conviction [. . .] ." *Moran v. Burbine*, 475 U.S. 412, 420 (1986). A court assessing the sufficiency of *Miranda* warnings considers whether the warnings reasonably convey to an individual their rights against self-incrimination. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). While the wording of the warnings does not need to follow the exact formulation in *Miranda*, warnings may be rejected as inadequate when taken as a whole, they are too informal and imprecise. *See, e.g., State v. Hong*, 611 P.2d 595, 596 (Haw. 1980) (explaining that suppression was warranted where officer's warnings, that the suspect "didn't have to answer my questions, that he had the right to an

attorney and that he could remain silent," failed to "convey to the defendant clearly and understandably the full panoply of his rights.").

[20] A dilution of the *Miranda* warning that misstates its purpose can be fatal to a finding of adequacy. Warnings are inadequate when the defect is "not one of form or phrasing, but of substance and omission." *United States v. Street*, 472 F.3d 1298, 1312 (11th Cir. 2006) (stating that where a suspect is not told that anything he says may be used against him in court, the warning may be deemed inadequate). Warnings may be rendered inadequate by translation into a foreign language that modifies in such a way as to no longer communicate the original substance. *See United States v. Perez-Lopez*, 348 F.3d 839, 848-49 (9th Cir. 2003) (holding that a Spanish-language *Miranda* warning was inadequate in conveying the government's obligation to provide an attorney to a Spanish-speaking defendant, where the warning translated to "[i]n case you don't have enough money or funds, you have the right to solicit the Court for an attorney"); *State v. Ramirez*, 732 N.E.2d 1065, 1068-70 (Ohio Ct. App. 1999) (holding that a Spanish translation of the *Miranda* warnings that substituted the term "right hand side" for the term "legal right," among other errors, failed to sufficiently apprise the accused of his *Miranda* rights).

[21] In *United States v. Tillman*, the Sixth Circuit Court of Appeals found *Miranda* warnings that omitted the advisement that anything that the suspect said could be used against him in court to be inadequate. 963 F.2d 137, 141 (6th Cir. 1992). The *Tillman* court expressed the special import of the warning that a defendant's statements could be used against him:

> Of all of the elements provided for in Miranda, this element [that a defendant's statements could be used against him in a court of law] is perhaps the most critical because it lies at the heart of the need to protect a citizen's Fifth Amendment rights. The underlying rationale for the Miranda warnings is to protect people from being coerced or forced into making self-incriminating statements by the

> government. By omitting this essential element from the Miranda warnings a person may not realize why the right to remain silent is so critical. Although we as judges and lawyers may be aware of the link between these elements we can not be so presumptuous as to think that it would be common knowledge to laymen. It would clearly be unreasonable to say defendant was somehow informed of this right. He was informed he did not have to say anything to the police, but, was never told that any statements he might make could be used against him. This is a dangerous omission because a person under arrest would feel more compelled to answer questions of police officers.

Id.

[22] Rasauo's case is analogous to one in which the warning that anything a suspect says can be used against him in a court of law has been omitted. At the hearing on the motion to suppress, Officer Laxamana explained how he had administered the *Miranda* warnings to Rasauo. He stated it was his procedure to read a suspect the first six paragraphs of the Custodial Interrogation form before asking him to read it himself, and then write the word "Yes" to indicate understanding after each paragraph. Transcript ("Tr."), vol. II at 26 (Suppression Hr'g, Apr. 1, 2009). On the third paragraph, Rasauo initially wrote "No" on the line asking if he understood "Anything you say can and will be used against you in a court of law" but then crossed it out and wrote "Yes". ER, tab 4 (Rasauo Custodial Interrogation Form, Dec. 1, 2007). When asked why Rasauo first wrote "No" Officer Laxamana stated, "[i]n the beginning he didn't understand that's why I explain to him." Tr., vol. II at 44.

[23] In attempting to explain the warning, Officer Laxamana said "I give him example like I said, for example, 'if I ask you a question, your answer—whatever the answer you told—you tell me, I'll put that down in my report.'" Tr., vol. II at 45 (Suppression Hr'g, Apr. 1, 2009). Officer Laxamana's translation—tantamount to saying "I will write down what you say"—did not reasonably convey that the statements could be used to incriminate Rasauo in court. Because the

warnings were inadequate, we cannot find that Rasauo's waiver of his *Miranda* rights was knowing, voluntary, or intelligent.

2. Denial of the motion to suppress

[24] The Fifth Amendment privilege against self-incrimination prohibits the prosecution from using statements stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards to secure that privilege. *Miranda v. Arizona,* 384 U.S. 436, 444 (1966); *Farata*, 2007 Guam 8 ¶ 20. Where the procedural safeguards of *Miranda* have been violated, the conviction will be sustained "'if admission of the un-*Mirandized* statements constituted harmless error.'" *United States v. Henley*, 984 F.2d 1040, 1044 (9th Cir. 1993) (quoting *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1047 (9th Cir. 1990)). "An error of constitutional dimension is harmless if the state has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993) (quotations and citations omitted). To find an error of constitutional dimension harmless is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Id.* (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991)).

a. Field Sobriety Tests

[25] A custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way." *Farata,* 2007 Guam 8 ¶ 20 (citation omitted). A defendant who is temporarily detained at a traffic stop, such as a sobriety checkpoint, is not generally considered to be "in custody" for the purposes of *Miranda. Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (expressly holding that a motorist who is temporarily detained after being stopped on suspicion

of operating a motor vehicle while under the influence of intoxicating liquor is not held in custody, and, as a result, the investigating police officer is not required to furnish *Miranda* warnings to the motorist before administering field sobriety tests).

[26] In *Berkemer,* the United States Supreme Court reasoned that although a traffic stop was unquestionably a seizure within the meaning of the Fourth Amendment, such traffic stops typically are brief, unlike a prolonged station house interrogation, and further, that such traffic stops commonly occur in the public view, in an atmosphere far less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* itself. *Id.* at 436-39. The detained motorist's freedom of action [was not] curtailed to a "degree associated with formal arrest." *Id.* at 440 (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). Accordingly, the defendant was not entitled to a recitation of his constitutional rights prior to arrest, and his roadside responses to questioning were admissible. *Id.*

[27] Rasauo has failed to allege any circumstances to distinguish his detention at the field sobriety checkpoint from the above-cited cases. We hold that Rasauo was not in custody while temporarily detained at the traffic stop, and the officer was not required to furnish *Miranda* warnings prior to administering the field sobriety tests. Despite the fact that Rasauo never validly waived his *Miranda* rights, the Superior Court did not err in denying the motion to suppress Rasauo's verbal admissions made to Officer Flickinger prior to and during the administration of the field sobriety tests.

b. Breathalyzer Test Results

[28] A breathalyzer test was administered to Rasauo after he was taken into custody. Rasauo contends the Superior Court erred in denying the motion to suppress the results of his breath test because there was no valid *Miranda* waiver. *See* Appellant's Br. at 1. The People respond that

the Constitution does not require a valid *Miranda* waiver prior to physical testing, because such testing is non-testimonial. Appellee's Br. at 15-16.[3]

[29] Unless a defendant has waived the privilege against self-incrimination, "[t]estimonial evidence that is a product of custodial interrogation is inadmissible [.]" *People v. Sangalang*, 2001 Guam 18 ¶ 12. However, while an accused may not be compelled to provide the State with evidence of a testimonial or communicative nature, a person can be forced to produce "real or physical evidence." *Schmerber v. California*, 384 U.S. 757, 761 (1966). As the United States Supreme Court has stated,

> The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.

Id.

[30] The results of physical tests, including breath tests, are deemed non-testimonial when they consist of observations of the suspect's physical condition and performance and do not result in communication that reveals subjective knowledge by the defendant. *People v. Berg*, 708 N.E.2d 979, 981 (N.Y. 1999) (finding that police's failure to administer *Miranda* warnings did not affect admissibility of chemical analysis test results in a prosecution for driving while intoxicated); *Vanhouton v. Commonwealth*, 676 N.E.2d 460, 464 (Mass. 1997) (explaining that *Miranda* warnings are not necessary where a detained motorist is not in custody); *People v. Hager*, 505 N.E.2d 237, 238 (N.Y. 1987) (Results of field sobriety tests are not deemed testimonial or communicative because they do not reveal a person's subjective knowledge or thought processes but, rather, exhibit a person's degree of physical coordination for observation

[3] The People also contend that the results of the field sobriety tests are non-testimonial. Appellee's Br. at 13-14. Because we have concluded that Officer Flickinger's administration of the Field Sobriety Tests ("FST) was not custodial interrogation, it is unnecessary to determine here whether the FST results were non-testimonial.

by police officers.); *State v. Stever*, 527 A.2d 408, 415 (N.J. 1987) (stating "[w]e have consistently held that the taking of a breathalyzer test is non-testimonial in nature and, therefore, is not covered by the privilege against self-incrimination.") *State v. Bunders*, 227 N.W.2d 727, 730 (Wis. 1975) (holding that *Miranda* warnings were not required when an arrested driver was asked to submit to a breathalyzer test, because the request did not involve testimonial utterances by the driver).

[31] We hold that because the breath test results are not "testimonial" evidence, the privilege against self-incrimination did not apply, and these results were admissible, irrespective of whether Rasauo executed a valid *Miranda* waiver.

c. Statements made in response to custodial interrogation

[32] Rasauo also made statements in response to Officer Laxamana's interrogation, after he had been taken into custody. The reported responses to Officer Laxamana's custodial interrogation are presented in Officer Laxamana's "Report of Alcohol Influence." SER, tab 8 (Report of Alcohol Influence, Dec. 1, 2007). Perhaps the most incriminating of these responses is an admission by Rasauo that he had had three Bud lights to drink in East Agana between 9:00 p.m. and midnight, immediately prior to his detention at the sobriety checkpoint.

[33] The Superior Court's failure to suppress these responses to custodial interrogation is error. Nevertheless, such error will not give rise to a reversal of Rasauo's conviction if it was harmless beyond a reasonable doubt. *United States v. Khan*, 993 F.2d 1368, 1376 (9th Cir.1993). Rasauo's responses were essentially cumulative of his earlier admissible statement at the scene of the traffic stop, that he had drunk two to four beers. *See* Tr., vol. II at 6 (Suppression Hr'g). Given the other evidence in the record, particularly the Breathalyzer test results, the admission of Rasauo's custodial statements was cumulative and unimportant in relation to everything else the

jury considered on the issue in question. *See Greene v. Com*, 244 S.W.3d 128, 135 (Ky. Ct. App., 2008) (finding harmless error in similar factual circumstances).

3. Suppression under Due Process or Equal Protection grounds

[34] Rasauo claims that the police's failure to have the waiver and consent forms translated into languages commonly spoken on Guam, and the police's failure to expend greater efforts to obtain interpreters at checkpoints, violated his Due Process and Equal Protection rights. He argues:

> Both the 14th Amendment of the Constitution of the United States and the Organic Act of Guam guarantee the right not to be deprived of liberty without due process of law. [14th Amd.; §1421b(u).] In Guam, this right is extended to include people who do not speak English. The Organic Act of Gua[m] 1421(b) Bill of Rights (a)(n) specifically prohibits discrimination "against any person on account of . . . language. . . .

Appellant's Br. at 11.

[35] Rasauo contends that it directly follows from these provisions "that as a matter of due process and equal protection, the field sobriety test, Miranda warnings, and the Informed Consent form should all be given to suspects in the language that they speak fluently." *Id.* He cites to two cases to support these constitutional arguments: *People v. Garcia-Cepero*, 874 N.Y.S.2d 689 (N.Y. App. Div. 2008), and *State v. Santiago,* 556 N.W.2d 687 (Wis. 1996). We do not find support for Rasauo's arguments in our reading of *State v. Santiago*, which addresses the constitutional sufficiency of a *Miranda* warning translated into a language other than English. *Santiago*, 556 N.W.2d at 692. Therefore, our analysis must concentrate on the lone case of *People v. Garcia-Cepero.*

[36] It is doubtful that the one New York case cited by Rasauo to support his equal protection and due process claims can serve as authoritative precedent for either claim, much less both. Furthermore, Rasauo fails to apply the cited law to the facts of his case. For this court to

judiciously and efficiently consider claims of error raised on appeal, the parties must clearly and fully set forth their arguments in their briefs. Guam R. App. P. 13(a)(9) (2009). The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. Because Rasauo has presented no analysis to support his Equal Protection claim, we decline to review it.

a. Due Process

[37] The guarantee of due process of law found in the second sentence of section 1 of the Fourteenth Amendment of the United States Constitution is extended to Guam with the same force and effect as in the United States or in any State of the United States. 48 U.S.C.A, §1421b(u) (Westlaw currently through Pub. L. 111-311 (2011)). The 14th Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

[38] Rasauo appears to base his due process claim on one of two theories. The first is that he had a right to an interpreter from the time of arrest or even prior to arrest, pursuant to the Geneva Convention or the Federated States of Micronesia's Compact of Free Association with the United States. The second theory, similar to the one considered in *People v. Garcia-Cepero*, is that Rasauo's right to procedural due process was violated when Guam's implied consent statute was administered to him in language he did not fully comprehend.

b. Rights Pursuant to Treaty or Convention

[39] Rasauo urges that if "we were stopped in a foreign land we would all want the opportunity to have our rights under foreign law explained in our native language." Reply Br. at 2 (Nov. 3, 2009). This court is sympathetic to this argument and observes that Rasauo was

provided the assistance of an interpreter, Mr. Johnny, at the suppression hearing and at trial. Rasauo, however, claims a right to an interpreter before court proceedings.

[40] Rasauo contends that when he was apprehended at the sobriety checkpoint "[n]o effort was made to contact the [Federated States of Micronesia ("FSM")] Consulate who would have provided a translator from the FSM community on Guam." Appellant's Br. at 12. Officer Flickinger testified that Rasauo was never offered the assistance of an interpreter because "he never told me that he didn't speak English." Tr., vol. II at 14 (Suppression Hr'g).[4] Consul General Gerson Jackson of the Federated States of Micronesia testified at the suppression hearing that he was not contacted by the police when Rasauo was arrested. *Id.* at 7-9. He testified that if he had been notified, he could have rendered the necessary interpretation and translation assistance before the defendant had been given Miranda warnings, and that he was willing to provide such services for every FSM citizen who is arrested. *Id.* According to the Consul General there was a prior agreement with the Guam Chief of Police to provide translators for DUI checkpoints, but this practice was recently stopped "for the sake of convenience." *Id.* at 10.

[41] Even crediting all the above testimony, we are unable to discern what specific legal right of Rasauo's has been violated. Rasauo asserts that "[t]he protocol for providing translators is in the Convention as well as the Treaty Compact of Free Association." Appellant's Br. at 7. However, Rasauo fails to provide this protocol or a citation to specific provisions within either document, and has not provided any analysis to show that the remedy for a violation of the convention or treaty, if such a violation were shown, would be suppression of the evidence.

[4] Officer Flickinger's testimony presents competing descriptions of what procedure the Guam Police follow when they encounter a suspect with limited command of English. According to the Officer's testimony on cross-examination by defense counsel, "[i]f they don't ask for it then I don't offer it." Tr., vol. II at 18 (Suppression Hr'g). On redirect, Officer Flickinger clarified that "[w]e'll make every attempt to get somebody to interpret for us if there's any – any reason that I feel that he doesn't speak English, or she, or they state that they do not speak or understand English." *Id.* at 20.

Under these circumstances, we cannot find that the Superior Court's denial of the motion to suppress was reversible error.

b. Implied Consent Form

[42] Officer Laxamana gave Rasauo an "implied consent form," which purported to give Rasauo a choice between submitting to a blood, urine, or breath test. Rasauo signed his name on the line next to the word "Breath," by which he was deemed to have opted for a breath test. SER, tab 7 (Implied Consent Form for DUI, Dec. 1, 2007). On appeal, Rasauo alleges that he did not have adequate English skills to read the [implied] consent form, and that the police "should have attempted to ascertain whether he understood." Appellant's Br. at 13. The authority he cites for this argument is *People v. Garcia-Cepero,* 874 N.Y.S. 2d. 689 (N.Y. App. Div. 2008).

[43] A defendant whose fluency in English is so impaired that it interferes with his right to confrontation or his capacity, as a witness, to understand or respond to questions has a constitutional right to an interpreter in criminal proceedings. *People v. Nuguid*, 1991 WL 336901 (D. Guam App. Div., 1991) at *3, *citing U.S. v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986). A defendant may be denied due process when he cannot comprehend the proceedings against him. *United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001). However, there is no constitutional right analogous to *Miranda* to knowingly and voluntarily consent or refuse to submit to a properly administered chemical test such as a breath test.[5] *See Schmerber v. California*, 384 U.S. 757, 765 (1966) (finding that blood test evidence was not inadmissible on

[5] A compulsory test performed under "circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the 'search,' and" might be an unreasonable search under the Fourth Amendment. *Schmerber*, 384 U.S. at 765; *see also State v. Ravotto*, 777 A.2d 301, 308 (NJ 2001). Rasauo has not alleged that suppression should have been granted on Fourth amendment grounds, therefore this issue is not addressed.

privilege grounds, although an incriminating product of compulsion, because it was neither testimony nor evidence relating to some communicative act or writing by the petitioner); *Commonwealth v. Bowser*, 624 A.2d 125, 131 (Pa. 1993) (defendant has no right to *Miranda* warnings before being asked to submit to alcohol test); *State v. Piddington*, 623 N.W.2d 528, 542-44 (Wis. 2001) (discussing the level of understanding required by statute providing for implied consent warnings); *People v. Burnet*, 882 N.Y.S.2d 835, 843 (N.Y. App. Div. 2009) (finding there is no fundamental right to an interpreter during a chemical test process).

[44] Due process does not necessarily require that drivers be meaningfully advised of the implied consent rights in language they can understand. *See People v. Wegielnik*, 605 N.E.2d 487, 491 (Ill. 1992); *Rodriguez v. State*, 565 S.E.2d 458, 458-62 (Ga. 2002) (holding that a non-English-speaking defendant convicted of driving under the influence of alcohol was not denied equal protection or due process under the United States Constitution or the Georgia Constitution when the results of his blood-alcohol tests were admitted at trial, even though the implied consent warning required under the relevant state statute was not read or interpreted in a language that defendant could understand).

[45] The right to refuse testing or consent to a specific test is generally not deemed to be a constitutional right, but rather one created by the legislature. In *South Dakota v. Neville*, the Supreme Court held that a state's failure to specifically warn a DUI suspect that his refusal to submit to a blood alcohol test could be used against him at trial did not violate due process, since the right to refuse the test was a matter of legislative grace bestowed by the South Dakota Legislature. 459 U.S. 553, 565 (1983). Similarly, in *Rodriguez,* the Supreme Court of Georgia found that the right to implied consent warnings created by statute was a matter of legislative

grace and not a right of constitutional dimension like the right to silence underlying *Miranda.* 565 S.E.2d at 462 n.24.

[46] In *People v. Garcia-Cepero*, a New York court interpreted New York's implied consent statute to establish a defendant's right to receive warnings in language understandable by the defendant. *See Garcia-Cepero*, 874 N.Y.S. 2d. 689, 698. The case involved a Spanish speaking defendant who was arrested and charged with operating a motor vehicle under the influence of alcohol, and a hearing was held to determine, among other things, whether the defendant had refused to submit to a breath test. *Id.* at 691. In the section of the opinion to which Rasauo cites, the court construed whether an officer had given sufficient warning to a defendant of the evidentiary effect of a refusal to submit to a chemical test pursuant to New York Vehicle and Traffic Law § 1194(2)(f), which requires such warning to be "in clear and unequivocal language." *Id.* at 692 (italics omitted). The court cited to *People v. Niedzwiecki*, in which the court had held that a defendant's refusal to submit to testing may not be introduced into evidence against him pursuant to statute unless police adhere to statutory requirement that police advise suspect of refusal rights and consequences in "clear and unequivocal language" understandable by the defendant. 487 N.Y.S.2d. 694, 695 (N.Y. Crim. Ct. 1985).

[47] *People v. Garcia-Cepero* and the cases interpreting New York Vehicle and Traffic Law § 1194(2)(f) are of questionable relevance here, since Guam's comparable vehicle code provisions include no such requirement of "clear and unequivocal language". *Garcia-Cepero*, 874 N.Y.S. 2d. at 693. Instead, 16 GCA § 18201(c) provides:

> If there is probable cause to believe that a person is in violation of § 18102 of this Chapter, then the person *shall have the option* of using a blood or urine, or breath test for the purpose of determining the alcohol or controlled substance content of that person's blood or urine.

16 GCA § 18201(c) (2005) (emphasis added). The statute requires the police to give a person the option of using a blood or breath test, and the police appear to have given Rasauo such an option, of which he availed himself by signing his name next to the word "Breath."

[48] The People contend that Guam's statutory scheme includes "no specific express requirement for any procedural safeguards." Appellee's Br. at 15. We need not reach the question here. Rasauo has failed to point to authority or provide argument to show that Guam's failure to adopt procedures that ensure a non-English speaking defendant understands the implied consent form is a violation of due process, or that the proper remedy if a defendant does not understand the consent form is to suppress the evidence. In fact, Rasauo has not cited to Guam's informed consent statute in his brief, nor has he alleged that his failure to understand the consent form stripped him of a statutory right to choose between a breath, urine, or blood test under 16 GCA § 18201 or §18203. Because Rasauo has not fairly alleged a violation of the informed consent statute, we will not reach this question.

B. Motion to Dismiss

[49] Rasauo asserts the Superior Court erred in denying his motion to dismiss, in which he alleged violation of his statutory right to a speedy trial, prompt arraignment, and trial without unnecessary delay. Rasauo argues he is entitled to a dismissal because the Notice to Appear ("NTA") date was more than one year from the date of the misdemeanor offense. He contends that the NTA date itself must be set within the *de jure* statute of limitations—1 year for a misdemeanor, 3 years for a felony. Appellant's Br. at 14 (citing *People v. Villapondo,* 1999 Guam 31 ¶ 31). Rasauo further contends, as a matter of logic, that the delay of the arraignment date to December 24, 2008, more than ninety days after the complaint was filed on September 4, 2008, violated the statutory scheme, which in establishing a 60-day speedy trial period,

contemplates that the government should not take over ninety days to arraign a defendant after a complaint is filed. *Id.* at 3, 14-16.

[50] Although Rasauo alleges violation of his "statutory speedy trial rights," the claim of error is not a claimed violation of the speedy trial periods set forth in 8 GCA § 80.60. Appellant's Br. at 9, 17. Rather, it is a claim that the delay of his first appearance date and arraignment date violates the intent of the statutory scheme, violating either the proscription against unnecessary delay set forth in 8 GCA 80.70 (b) or the guarantee of a prompt arraignment set forth in 8 GCA § 60.10. However, Rasauo does not articulate what statute affords him a right to the remedy he seeks, dismissal of the charges for which he has already been convicted.

[51] We have stated that the sanction of dismissal for unnecessary delay in violation of 8 GCA § 80.70(b) should only be granted in extreme circumstances, and only after words of caution or forewarning, or pursuant to a uniform rule. *Stephen*, 2009 Guam 8 ¶ 21 (citing *U.S. v. Sears, Roebuck & Co.,* 877 F.2d 734, 737 (9th Cir.1989)). At the time that the Superior Court denied the motion to dismiss, no uniform rule had been promulgated to govern such dismissals. In light of our statement of the law in *Stephen*, we can find no abuse of discretion by the Superior Court in its denial of Rasauo's motion to dismiss for unnecessary pre-indictment delay.

[52] Whether the Superior Court abused its discretion in denying the motion to dismiss on prompt arraignment grounds presents a closer question. There is no statutory time limit for arraignment; instead, the statute provides merely that arraignment shall be "prompt." 8 GCA § 60.10 (2005). Although we have stated that delay of "merely a matter of weeks" does not violate a defendant's speedy trial rights, *Stephen*, 2009 Guam 8 ¶ 32 (internal citation omitted), we have never articulated a legal standard for determining the outer bounds of "prompt arraignment." The meaning of the word "prompt" as defined by Black's Law Dictionary depends mostly on the

facts in each case, because what is ['prompt'] in one situation may not be considered such under other circumstances and conditions. To do something 'promptly' is to do it without delay and with reasonable speed." BLACK'S LAW DICTIONARY 1214 (6th ed. 1990). Therefore, in determining whether arraignment has occurred with reasonable speed, a court must consider the specific circumstances of the case.

[53] Here, it is difficult to imagine the justification for the delay of more than ninety days between the date the complaint was filed and the arraignment. The delay in arraignment, during which time the speedy trial timelines set forth by 8 GCA § 80.60 have not yet been triggered and that an indigent defendant is still awaiting assignment of public counsel, concerns us. However, whether reversal of a conviction is an appropriate remedy for an unreasonable delay of the arraignment date, where no rule or statute establishes a specific timeline for arraignment, and no specific rule or statute prescribes the sanction of dismissal warrants further examination.

[54] Some courts have required a showing of prejudice before granting the remedy of dismissal or reversal of a conviction due to an unnecessary delay of arraignment. *See, e.g., State v. Vassar*, 533 P.2d 544, 545-46 (Ariz. 1975) (holding that failure to arraign a defendant within the ten-day time limit established by a rule of criminal procedure did not entitle a defendant to a dismissal unless actual prejudice was demonstrated); *People v. Combes*, 363 P.2d 4, 7-8 (Cal. 1961) (refusing to reverse a conviction for arresting officer's failure to take a defendant before a magistrate within the time specified by state law without some showing in the record that the defendant was prejudiced by the delay or was deprived of a fair trial). Even in a case in which a defendant had been incarcerated for more than thirty days before arraignment, the Supreme Court of Washington held that the defendant was not entitled to dismissal unless he could

demonstrate that the delay was oppressive, arbitrary or prejudicial. *State v. Eastland*, 467 P.2d 300, 300 (Wash. 1970).

[55] We hold that a defendant seeking to reverse his conviction upon appeal due to unnecessary delay of his arraignment date must demonstrate a prejudicial effect stemming from the delay. *See, e.g., Gill v. Villagomez*, 140 F.3d 833, 835 (9th Cir. 1997) (construing Cal. Penal Code § 1382, upon which 8 GCA § 80.60 is based, and citing *People v. Cory*, 204 Cal. Rptr. 117 (Cal. Ct. App. 1984)). In *People v. Nicholson*, we applied a different standard when a defendant contests the denial of a motion to dismiss via a pre-trial petition for a writ of mandamus. 2007 Guam 9 ¶ 24. In *Nicholson* we said "where a defendant seeks pretrial relief, he is not 'required to affirmatively show that he [has] been prejudiced by the delay." *Id.* Rather, in a mandamus action brought prior to trial, a defendant asserting a right to dismissal for violation of the statutory speedy trial timelines set forth in 8 GCA § 80.60 need only show unjustified delay in bringing the case. This same standard is used by the California courts and exists in California law from which much of our speedy trial statutes are derived. *People v. Wilson*, 383 P.2d 452 (1963); CA. Const. art. VI, § 13.

[56] We are mindful that California, unlike Guam, has a state constitutional provision that forbids reversal of a conviction for nonprejudicial error. *See* CA. Const. art. VI, § 13. Thus, California courts were bound by their constitution to require a defendant asserting a statutory speedy trial claim after conviction to show that the delay caused prejudice. *See People v. Martinez*, 996 P.2d 32, 45 (Cal. 2000). We have no analogous constitutional provision and therefore are not so bound. However, we are persuaded that maintaining this distinction is sound policy, serving to encourage a defendant to seek appellate review of denial of a statutory speedy trial claim before a trial has been held.

[57] We find instructive the reasoning of the California Supreme Court set forth in *People v. Wilson*[6], 383 P.2d 452, 460 (Cal. 1963) (addressing the issue of whether abridgment of a defendant's right under California's speedy trial statute requires a reversal of the conviction). The court observed that the purpose of the right to a speedy trial is to protect the accused from having criminal charges pending against him for an undue length of time. *Id.* Therefore, prior to the commencement of a trial, a defendant need not affirmatively show that he has been prejudiced to be entitled to a dismissal on statutory speedy trial grounds. *Id.* On the other hand, a motion to dismiss brought after trial has commenced no longer serves to protect the accused from having criminal charges pending against him for an undue length of time. *Id.* When such a motion is brought after conviction, "nothing that any court can do" can relieve the defendant of a delay that no longer exists. *Id.*

[58] Where, as here, a defendant has been tried and convicted, no charges are pending against him and it is too late to relieve the defendant of the delay in bringing him to trial. Rasauo has not shown that any delay of his first appearance date or of the arraignment date prejudiced his case. Absent such a showing of prejudice, even if Rasauo could demonstrate a statutory violation, his conviction does not merit reversal.

V. CONCLUSION

[59] Rasauo brings this appeal after a jury trial resulting in his conviction of drunk driving as a misdemeanor. We agree with Rasauo's assertion that his *Miranda* rights were violated when the police failed to provide him an adequate translation of one of the warnings. However, any error of the Superior Court in denying the motion to suppress was harmless, because the only evidence that was inadmissible as the fruit of custodial interrogation was duplicative of other admissible

[6] In *Nicholson,* in deciding to adopt the standard, we cited to *People v. Wilson,* 383 P.2d 452 (1963) and *People v. Johnson*, 606 P.2d 738 (Cal. 1980).

evidence. Suppression also was not warranted due to claimed Equal Protection and Due Process violations because Rasauo failed to sufficiently brief these claims to warrant this court's entry into those uncharted waters.

[60] Turning to the Superior Court's denial of Rasauo's motion to dismiss, we find that Rasauo did not appeal this denial prior to trial, via a writ of mandamus. Consequently, he bears the additional burden of showing that he has been prejudiced by any delay, a burden which he has failed to shoulder.

[61] The judgment below is **AFFIRMED**.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice