NO. SCWC-30442

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI , Respondent/Plaintiff-Appellee,

vs.

ALBERT VILLADOS, JR., Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 30442; CR. NO. 08-1-0115(2))

DISSENT BY ACOBA, J.

I would accept the application for writ of certiorari (Application) filed by Petitioner/Defendant-Appellant Albert Villados, Jr. (Petitioner) inasmuch as this case presents a question of this court's jurisdiction to entertain an untimely application in an appeal of a criminal defendant's case. See State v. Grant, No. 30498, 2012 WL 1701394 (Haw. May 15, 2012) (Acoba, J., dissenting); In the Interest of M. Children BM., No.

11-00000153, 2012 WL 2397931 (Haw. June 21, 2012) (Acoba, J., dissenting).

I.

In a November 28, 2011 Summary Disposition Order (SDO), the Intermediate Court of Appeals (ICA) affirmed Petitioner's conviction on all counts. On December 31, 2011, Petitioner's appellate counsel at the time (counsel) wrote to Petitioner[1] to let him know that despite having "received calls or messages from [Petitioner's] cousin and [Petitioner's] sister passing on [Petitioner's] message to [her] that [he] want[ed] [her] to file the writ of certiorari," she would not be filing a writ on his behalf, because "at [that] time, [she did] not see 'grave errors of law or fact' in the decision of the ICA in [Petitioner's] case, and [she did] not see obvious inconsistencies with other ICA, Hawai'i Supreme Court or federal decisions." The ICA entered its judgment on appeal on January 4, 2012.

On January 20, 2012, Petitioner's counsel wrote again to Petitioner, stating that she had "decided to file a writ on [Petitioner's] behalf" and that she "hope[d] to file that Writ by the end of January." Petitioner's counsel did not seek to extend

[1] Petitioner's Application included attached copies of his Motions as well as three letters addressed to him from counsel. Respondent did not question these attachments.

the time for filing an application for certiorari,[2] and therefore Petitioner had thirty days, or until February 3, 2012, to timely file an application. Nearly a month after her January 20 letter, on February 15, 2012, counsel wrote to Petitioner a third time, stating that "[b]ecause [Petitioner] wanted [her] to file an application for writ of certiorari, and asked [her] to file one, [she] reconsidered and tried to determine what points of error might support a writ." However, she had "ultimately decided that [she] could not meet the requirements relating to the filing of an application for a writ of certiorari and that [she] could not file an application for a writ of certiorari." By that time, the time to file an application had expired, and Petitioner was left with no further remedy.[3]

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[2] Before January 1, 2012, a party was allowed ninety days after the ICA entered its judgment to file an application for writ of certiorari. Hawai‘i Rules of Appellate Procedure (HRAP) Rule 40.1(a) (2010); Hawai‘i Revised Statutes (HRS) § 602-59(c) (Supp. 2010). HRS § 602-59(c) was amended to provide that effective January 1, 2012, an application for writ of certiorari may be filed no later than thirty days after the ICA enters its judgment. HRS § 602-59(c) (2012). A party may, upon written request filed prior to the expiration of the thirty day period, extend the time for filing by an additional thirty days. Id.

[3] In a letter dated February 15, 2012, counsel wrote,

> [I] ultimately decided that I could not meet the requirements relating to the filing of an application for a writ of certiorari and that I could not file an application for a writ of certiorari. . . .

(continued...)

On June 12, 2012,[4] Petitioner filed (1) a Motion for Relief from Default and Permission to File a Writ of Certiorari; (2) a Motion for Appointment of Counsel to appeal the Judgment, Guilty Conviction Sentence and SDO; and (3) the Application. In the Application, Petitioner included his own affidavits alleging that he was denied effective assistance of counsel when counsel failed to represent Petitioner in the pursuit of a writ of certiorari. Petitioner's first affidavit stated in relevant part:

> 3. Petitioner's former attorney (appellate counsel) [] refused to file a writ of certiorari on Petitioner's behalf;

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[3](...continued)

> The time to file the writ is now be [sic] expired. Should you feel that my failure to file an application for writ of certiorari is an instance of ineffective assistance of counsel - which I would not agree with - your remedy may be a Rule 40 petition, which is used to allege ineffective assistance of appellate counsel. If you elect that route, you may be able to apply for an attorney to assist you with that petition through the Second Circuit Court. . . .

[4] Petitioner's Application was electronically filed on June 18, 2012, but it should be deemed filed on June 12, 2012, pursuant to the "mailbox rule" applicable to pro se prisoners. See Setala v. J.C. Penney Co., 97 Hawai‘i 484, 485, 40 P.3d 886, 887 (2002) (holding that "a notice of appeal is deemed 'filed' for purposes of [HRAP] Rule 4(a) on the day it is tendered to prison officials by a pro se prisoner"). It would appear that an application for writ of certiorari would be "deemed filed" for purposes of HRAP Rule 40.1(a) on the day it is tendered to prison officials by the prisoner. See id. Here, Petitioner's Application included a notarized certificate of service verifying that he tendered his Application to the prison mailbox on June 12, 2012, and therefore the Application should be considered filed on that date.

> 4. Through a letter dated December 31, 2011, [counsel] informed Petitioner after receiving numerous messages from family members that Petitioner desires to file a writ of certiorari: "I will review the ICA decision again within 60 days to see if there is a basis to file a writ."
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> 5. Through a letter dated January 20, 2012, [counsel] informed Petitioner: "I have decided to file a writ of certiorari on your behalf" . . . "I hope to file the writ by the end of January."
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> 6. Through a letter dated February 15, 2012, [counsel] informed Petitioner: "Therefore, with all due respect to your desire to have a writ filed, I have not filed one and will not be filing one" . . . "The time to file the writ is now expired."

Petitioner's second affidavit, relating to his request for appointment of counsel, stated in relevant part:

> 2. [Petitioner] alleges that he was denied effective assistance of counsel when attorney failed to represent Petitioner in the pursuit of a writ of certiorari;
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> 3. [Petitioner] lacks the knowledge in preparing such a case before the Supreme Court of the State of Hawai'i;
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> 4. [Petitioner] is getting piecemeal assistance from various inmates in preparing this case;
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> 5. [Petitioner] has no experience or education in legal law;
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> 6. [Petitioner] is unable to determine complex legal issues that might have merit to this case;
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> 7. [Petitioner] has to rely on unknowledgeable inmate assistance[.]

On June 21, 2012, Respondent filed its Opposition to Petitioner's motions and Application (Response), asserting that the Application was untimely, and should therefore be dismissed.

II.

A.

As a general rule, "compliance with the requirement of timely filing a notice of appeal is jurisdictional, and [this court] must dismiss an appeal on [its] own motion if [it] lacks

jurisdiction." State v. Knight, 80 Hawai‘i 318, 323, 909 P.2d 1133, 1138 (1996). However, this court has permitted belated appeals under certain circumstances, "namely, when . . . defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance[.]" Id. (brackets and ellipsis in original) (citation omitted) (emphasis added); see also State v. Erwin, 57 Haw. 268, 554 P.2d 236 (1976) (holding that a court appointed counsel's failure to file a timely appeal for an indigent criminal defendant does not foreclose the defendant's right to appeal his conviction in the first instance); Grattafiori v. State, 79 Hawai‘i 10, 13-14, 897 P.2d 937, 940-41 (1995) ("[W]e have permitted belated appeals . . . when . . . defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance[.]") (emphasis added). As with a direct appeal, on certiorari, an inexplicable failure to timely file an application for writ of certiorari should be excused, particularly where the failure to timely file was the first instance of tardiness on the part of counsel. See State v. Irvine, 88 Hawai‘i 404, 407, 967 P.2d 236, 239 (1998) (explaining that this court has made exceptions to the timeliness requirement where "defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance") (emphasis added).

In numerous cases, and under varying circumstances, this court and the ICA have heard appeals in criminal cases despite the fact that the defendant's attorney failed to perfect the appeal, or that the appeal was not timely filed. In State v. Caraballo, 62 Haw. 309, 615 P.2d 91 (1980), this court held that a defendant's late filing of an appeal should be excused. The defendant had decided to withdraw his appeal due to advice from counsel. Id. at 310, 615 P.2d at 93. However, after the ten-day period to file a notice of appeal had expired, the defendant learned that counsel had given him bad advice. Id. at 310-311, 615 P.2d at 93-34. The defendant then filed a motion for leave to appeal in forma pauperis. Id. Although acknowledging that the time for filing an appeal was jurisdictional and that the ten-day period for filing a notice of appeal "had long since run," this court held that "especially in this situation where [the] defendant was denied his right to appeal because of ineffective assistance of his counsel, the rule should be relaxed." Id. at 311, 615 P.2d at 94.

Subsequently, in Grattafiori, this court explained that it had permitted belated appeals under two sets of circumstances: (1) when "defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance," and (2) when "the lower court's decision was unannounced and no notice of the entry of judgment was ever

provided." 79 Hawai‘i at 13-14, 897 P.2d at 940-41 (citing Caraballo, 62 Haw. at 315-16, 615 P.2d at 96). While Grattafiori stated that belated appeals have been excused "in the first instance," that term was not limited to direct appeals. In fact, Grattafiori cited Caraballo, and the rationale for relaxing the deadline in that case was that the "defendant [had] withdr[awn] his appeal based on counsel's erroneous advice and through no fault of his own[.]" Caraballo, 62 Haw. at 315, 615 P.2d at 96.

In the instant case, Petitioner's counsel was ostensibly ineffective. Petitioner stated in his Affidavit that he and his family members had repeatedly asked counsel to file the writ, and that he had been misled to believe that counsel would file an application on his behalf. Counsel had a duty to, at the very least, communicate with Petitioner in a timely manner, and to file an application on his behalf even if she disagreed with his desire to file. See In re Mohr, 97 Hawai‘i 1, 7, 32 P.3d 647, 653 (2001) (In lieu of abandoning representation on counsel's belief that an appeal should not be taken, "[w]e think the better policy is to require counsel to remain an advocate for the client. [T]his court will not sanction a court-appointed attorney if, after taking into account the totality of the circumstances, arguments raised reflect zealous advocacy on behalf of the client.").

The instant case falls squarely under the reasoning of

Caraballo, where the ineffectiveness of counsel led the defendant to file a late notice of appeal. Similarly, Petitioner's counsel was ostensibly ineffective when she led Petitioner to believe that she would file an application, failed to do so, and notified him of this fact after the deadline for filing had passed, thereby causing Petitioner to be late in filing his application, despite the admonition in In re Mohr that counsel has an obligation to file even if counsel disagrees with the client. See In re Mohr, 97 Hawai'i at 7, 32 P.3d at 653. Under these circumstances, Caraballo would excuse Petitioner's tardiness, as it was "based on counsel's erroneous advice and through no fault of his own." See Caraballo, 62 Haw. at 315, 615 P.2d at 96.

B.

It is abundantly clear from the Petitioner's actions that he would have filed a timely appeal via other means had it not been for his reliance on his counsel's statement from her letter dated January 20, 2012 that she "hope[d] to file that Writ by the end of January." Moreover, Petitioner should not be required to file a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 post-conviction petition in order for this court to address his claims. This court has stated that "in some instances, the ineffective assistance of counsel may be so obvious from the record that [an HRPP] Rule 40 proceeding would serve no purpose except to delay the inevitable and expend resources

unnecessarily." State v. Silva, 75 Haw. 419, 438-439, 864 P.2d 583, 592 (1993). HRPP Rule 40(a) plainly states that a post-conviction proceeding "shall not be construed to limit the availability of remedies . . . on direct appeal." The fact that Petitioner may have an opportunity to assert ineffective assistance of counsel in a future HRPP Rule 40 petition does not cure the fact that error has already occurred and Petitioner's substantial rights have been adversely affected. See Silva, 75 Haw. at 438-439, 864 P.2d at 592.

III.

A criminal appeal is adjudicated in accordance with due process of law only when the appellant has the effective assistance of counsel. By failing to file a writ, counsel may have caused Petitioner to forfeit any appealable issues raised in his Application. See Briones v. State, 74 Haw. 442, 466, 848 P.2d 966, 977 (1993) (defining appealable issue as "an error or omission by counsel, judge, or jury resulting in the withdrawal or substantial impairment of a potentially meritorious defense."). As such, counsel may have been ineffective. See id., 74 Haw. at 467, 848 P.2d at 978 ("If, however, an appealable issue is omitted as a result of the performance of counsel whose competence fell below that required of attorneys in criminal cases then appellant's counsel is constitutionally ineffective."). In my view, "[i]t is fundamentally wrong to lay

the fault for the failure to file a timely motion . . . and the resulting delay at the feet of Petitioner, rather than appellate counsel." In re RGB, 123 Hawai'i 1, 67, 229 P.3d 1066, 1132 (2010) (Acoba, J., dissenting, joined by Duffy, J.). This is the first instance of untimely filing in the appellate process of this case. Cf. Rapozo v. Better Hearing of Hawaii, LLC, 120 Hawai'i 257, 262-63, 204 P.3d 476, 481-82 (2009) ("the appellate process is not a series of discrete actions, but a continuation of the proceedings initiated before lower courts"). In my view, this court should not reject Petitioner's Application on account of his filing late. For this reason, I respectfully dissent to rejection of the Application.

DATED: Honolulu, Hawai'i, July 20, 2012.

/s/ Simeon R. Acoba, Jr.