

**Electronically Filed  
Supreme Court  
SCWC-30498  
15-MAY-2012  
01:46 PM**

NO. SCWC-30498

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

ROBERT GRANT, Petitioner/Defendant-Appellant.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(ICA NO. 30498; CR. NO. 08-1-0521)

DISSENT BY ACOBA, J.

I would accept the application for writ of certiorari (Application) filed by Petitioner/Defendant-Appellant Robert Grant inasmuch as this case presents a question of this court's jurisdiction to entertain an untimely application in a direct appeal of a criminal case.

On November 18, 2008, Petitioner was charged with Manslaughter, Hawai'i Revised Statutes (HRS) § 707-702(1)(a),<sup>1</sup> for

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<sup>1</sup> HRS § 707-702 provides in relevant part:

**S 707-702. Manslaughter** (1) A person commits the offense of manslaughter if:  
(a) The person recklessly causes the death of another person  
. . . .

recklessly causing the death of Daniel Martina. A jury trial was held in the Circuit Court of the Third Circuit (the court),<sup>2</sup> and Petitioner was convicted on December 22, 2009. The court entered its Judgment of Conviction and Sentence on April 16, 2010.

Petitioner timely appealed his conviction to the Intermediate Court of Appeals (ICA) on May 11, 2010. Petitioner claimed the court made several errors during trial that warranted a reversal of the conviction. The ICA rejected Petitioner's claims of error in a summary disposition order (SDO) filed on October 25, 2011. State v. Grant, No. 30498, 2011 WL 5089798 (Haw. App. Oct. 25, 2011).

The ICA entered its judgment on appeal on January 6, 2012. On April 9, 2012, Petitioner filed his Application. On April 16, 2012, the State of Hawai'i (Respondent) filed a Response to Application (Response), asserting that Petitioner's Application was untimely, and should therefore be dismissed. Petitioner did not file a reply.

## II.

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)<sup>3</sup>; HRS § 602-59(c) (Supp. 2010).<sup>4</sup> In 2011,

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<sup>2</sup> The Honorable Glenn S. Hara presided.

<sup>3</sup> HRAP Rule 40.1(a) (2010) provides:

(a) Application; when filed. No later than 90 days after  
(continued...)

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).<sup>5</sup> 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.* HRAP Rule 40.1 (2012)<sup>6</sup>

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<sup>3</sup>(...continued)

filling of the intermediate court of appeals' judgment on appeal or dismissal order, any party may file an application for a writ of certiorari in the supreme court.

<sup>4</sup>

HRS § 602-59(c) (2010) provides:

(c) An application for writ of certiorari may be filed with the supreme court no later than ninety days after the filing of the judgment or dismissal order of the intermediate appellate court. Opposition to an application for a writ of certiorari may be filed no later than fifteen days after the application is filed. The supreme court shall determine to accept the application within thirty days after an objection is or could have been filed. The failure of the supreme court to accept within thirty days shall constitute a rejection of the application.

(Emphasis added.)

<sup>5</sup>

HRS § 602-59(c) (2012) provides:

(c) An application for a writ of certiorari may be filed with the supreme court no later than thirty days after the filing of the judgment or dismissal order of the intermediate appellate court. Upon a written request filed prior to the expiration of the thirty-day period, a party may extend the time for filing an application for a writ of certiorari for no more than an additional thirty days. Opposition to an application for a writ of certiorari may be filed no later than fifteen days after the application is filed. The supreme court shall determine to accept the application within thirty days after an objection is or could have been filed. The failure of the supreme court to accept within thirty days shall constitute a rejection of the application.

(Emphasis added.)

<sup>6</sup>

HRAP Rule 40.1(a) (2012) provides:

Rule 40.1. Application for Writ of Certiorari in the Supreme Court

(continued...)

was also amended to conform to HRS § 602-59(c).

In this case, the ICA's judgment was entered on January 6, 2012. Petitioner did not seek to extend the time for filing his Application. Thus, Petitioner had thirty days, or until February 6, 2012, to file his Application. Petitioner's Application was not filed until April 9, 2012, apparently rendering it untimely.<sup>7</sup>

### III.

"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

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<sup>6</sup>(...continued)

(a) Application; When Filed; Extension of Time.

(1) Application; Time to File. A party may seek review of the intermediate court of appeals' decision by filing an application for a writ of certiorari in the supreme court. The application shall be filed within thirty days after the filing of the intermediate court of appeals' judgment on appeal or dismissal order, unless the time for filing the application is extended in accordance with this rule.

(2) Request Extending Time; Time to File. A party may extend the time to file an application for a writ of certiorari by filing a written request for an extension. The request for extension shall be filed no later than 30 days after entry of the intermediate court of appeals' judgment on appeal or dismissal order.

(3) Timely Request; Automatic Extension; Notice. Upon receipt of a timely written request, the appellate clerk shall extend the time for filing the application to the sixtieth day after entry of the intermediate court of appeals judgment or dismissal order. The appellate clerk shall note on the record that the extension was granted. The clerk shall give notice the request is timely and granted.

(4) No Extension if Untimely. An untimely request shall not extend the time. The clerk shall give notice the request is untimely and denied.

<sup>7</sup> If the ninety-day rule had been in effect, Petitioner's Application would still have been untimely, because the ninety-day period ended on April 5, 2012.

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); see also State v. Caraballo, 62 Haw. 309, 615 P.2d 91 (1980) (permitting appeal filed after the deadline where defendant had withdrawn his initial appeal based upon counsel's erroneous advice); State v. Erwin, 57 Haw. 268, 554 P.2d 236 (1976) (holding that court-appointed counsel's failure to file a timely appeal for an indigent criminal defendant did not foreclose the defendant's right to appeal his conviction); State v. Naone, 92 Hawai'i 289, 300, 990 P.2d 1171, 1182 (App. 1999) (addressing issues raised in the defendant's untimely appeal); State v. Ahlo, 79 Hawai'i at 385-392, 903 P.2d 690, 697 (App. 1995) ("This court and the Hawai'i Supreme Court have seen fit in criminal cases to relax the deadline for filing a notice of appeal 'where justice so warrants.'").

#### IV.

The right to "appeal is guaranteed by statute to every criminal defendant who deems himself or herself aggrieved by district or circuit court judgment." Briones v. State, 74 Haw. 442, 460, 848 P.2d 966, 975 (1993) (citations omitted). An appeal as of right is adjudicated in accordance with due process

of law only when the appellant has the effective assistance of counsel. By filing late, 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.").

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.<sup>8</sup> 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);

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<sup>8</sup> This court has rejected applications for writ of certiorari in the past due to untimeliness. See, e.g., State v. Quino, 74 Haw. 161, 167 n.6, 840 P.2d 358, 361 n.6 (1992) (noting that defendant's motion for leave to join application for writ of certiorari was denied due to untimeliness). But these cases did not expressly consider that an exception to the timeliness requirement exists for appeals in criminal cases. As such, these cases are distinguishable.

Knight, 80 Hawai‘i at 323, 909 P.2d at 1138 (“[W]e have 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[.]”) (ellipsis in original) (citation omitted).

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). This is the first instance of untimely filing in the direct appeal 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, thus, this court should grant Petitioner’s Application to consider whether an exception should be made to the time requirements in HRS § 602-59(c) and HRAP Rule 40.1 under the circumstances of this case. For this reason, I respectfully dissent to rejection of the Application.

DATED: Honolulu, Hawai‘i, May 15, 2012.

/s/ Simeon R. Acoba, Jr.

