NO. SCWC-11-0000153

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

IN THE INTEREST OF M. CHILDREN: BM

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. CAAP-11-0000153; FC-S NO. 08-11988)

DISSENT BY ACOBA, J.

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

I.

In a January 20, 2012 Summary Disposition Order (SDO), the Intermediate Court of Appeals (ICA) affirmed the February 23, 2011 Decision Re: Trial and the March 8, 2011 Order Terminating Parental Rights entered by the Family Court of the First Circuit Court (the court). The ICA entered its judgment on appeal on February 9, 2012. On May 8, 2012, Petitioner filed the Application. On May 22, 2012, Respondent/Appellee State of

Hawai‘i Department of Human Services filed its Response to the Application, asserting that the Application was untimely, and should therefore be dismissed. Petitioner did not file a reply.

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). In 2011, 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.[1]

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[1] 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.

HRAP Rule 40.1(a) (2012) provides:

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

(continued...)

In this case, the ICA's judgment was entered on February 9, 2012, and Petitioner did not seek to extend the time for filing an application for certiorari. Under the prior ninety-day rule, Petitioner would have had until May 9, 2012 to file the Application, and the Application, filed on May 8, 2012, would have been timely. However, under the current thirty-day rule, Petitioner had only until March 12, 2012 to file the Application, and thus the May 8, 2012 Application was untimely.

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 Haw. 318, 323, 909 P.2d 1133,

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[1](...continued)

(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.

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 Haw. 289, 300, 990 P.2d 1171, 1182 (App. 1999) (addressing issues raised in the defendant's untimely appeal).

It is well settled that this court may relax the deadline for filing a notice of appeal "where justice so warrants" and "the untimely appeal had not been due to the defendant's error or wilful inadvertence." State v. Shinyama, 101 Hawai‘i 389, 393 n.6, 69 P.3d 517, 521 n.6 (2003) (quoting State v. Caraballo, 62 Hawai‘i at 312, 315, 615 P.2d at 94, 96). In numerous cases, and under varying circumstances, this court and the ICA have heard appeals in criminal cases despite the fact that the attorney failed to perfect the appeal, or that the appeal was not timely filed.

B.

A criminal appeal 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 her 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.[2] See State v. Irvine, 88 Haw. 404, 407, 967 P.2d 236, 239 (1998)

[2] 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.

(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); 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[.]") (emphasis added) (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).

III.

The same exception to a timely appeal should also apply in cases involving the termination of parental rights. "The liberty interest of a parent in the care, custody and control of his children is as fundamental as the interest of a criminal defendant in personal liberty, and the deprivation of that parental interest, in fact, may be more 'grievous.'" In re RGB, 123 Haw. 1, 51, 229 P.3d 1066, 1116 (2010) (Acoba, J., dissenting, joined by Duffy, J.) (quoting Lassiter v. Dep't of Social Services, 452 U.S. 18, 59 (1981) (Stevens, J.,

dissenting)). The Due Process Clause of the Fourteenth Amendment entitles a defendant in a criminal case to representation by counsel, and applies with "equal force" to a case of parental termination. Lassiter, 452 U.S. at 60 (1981) (Stevens, J., dissenting).[3] Thus, the rights afforded indigent parents in termination-of-parental-rights cases are akin to the rights of criminal defendants.

Respectfully, "it is illogical and unfair for this court to impose a stricter standard on parents in family court proceedings than on defendants in criminal court proceedings where this court has recognized that parents in termination proceedings [independent of the Federal Constitution] 'have a [similar] substantial liberty interest . . . protected by the due process clause of article I, section 5 of the Hawai'i Constitution.'" RGB, 123 Hawai'i at 59, 229 P.3d at 1124 (2010) (Acoba, J., dissenting, joined by Duffy, J.) (quoting In re Doe, 99 Haw. 522, 533, 57 P.3d 447, 458 (2002)).[4] In RGB, "[i]t [was] . . . fundamentally wrong to lay the fault for the failure to file a timely motion for reconsideration and the resulting delay

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[3] It may be observed that "Hawai'i is now one of only five states that leaves the appointment of counsel for indigent parents in termination-of-parental-rights proceedings to the random method of case by case determination." In re RGB, 123 Hawai'i 1, 31, 229 P.3d 1066, 1096 (2010) (Acoba, J., dissenting, joined by Duffy, J.).

[4] Article 1, section 5 of the Hawai'i Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

at the feet of Petitioner, rather than appellate counsel." RGB, 123 Hawai‘i at 67, 229 P.3d at 1132 (2010) (Acoba, J., dissenting, joined by Duffy, J.). Similar circumstances are presented in this case.

This is the first instance of untimely filing in the direct appeal of this case. Cf. Rapozo v. Better Hearing of Hawai‘i, LLC, 120 Haw. 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"). 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 the dismissal of the Application.

DATED: Honolulu, Hawai‘i, June 21, 2012.

/s/ Simeon R. Acoba, Jr.