

CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the majority's opinion. I write separately to discuss the appellate courts' obligation in "confession of error" cases, as articulated in precedents of the Hawai'i Supreme Court. These precedents impose an obligation on the appellate courts to resolve issues on the merits, even if a party to the appeal confesses error. As stated by the supreme court: "In 'confession of error' cases, appellate courts have an independent duty 'first to ascertain that the confession of error is supported by the record and well-founded in law and second to determine that such error is properly preserved and prejudicial.'" State v. Veikoso, 102 Hawai'i 219, 221-22, 74 P.3d 575, 577-78 (2003) (quoting State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000)). This means that even if the appellee concedes the appellant's claim and confesses error, the appellate courts "must still" decide the appellant's claim of error on the merits. Hoang, 93 Hawai'i at 336, 3 P.3d at 502.

In my view, the "confession of error" rule should be modified to give the appellate courts the discretion to decide a claim based on a party's confession of error, without rendering a decision on the merits.^{1/} In other words, the appellate courts should have the option of either (1) accepting the confession of error and deciding the claim, not on the merits, but based solely on the confession of error; or (2) declining to rely on the confession of error and deciding the claim on the merits.

Our appellate courts are burdened with heavy caseloads. By confessing error, a party is conceding that the other party's claim is correct and that litigation over the claim is unnecessary. Where this occurs, I do not see why an appellate court must nevertheless be required to resolve the claim on the merits. Deciding a claim based solely on a confession of error would resolve the claim, but would not be a ruling on the merits

^{1/} By a decision on "the merits," I am referring to a decision that requires an analysis of whether the claimed error is supported by the record, well-founded in law, properly preserved, and prejudicial, as set forth in Veikoso and Hoang.

and would have no precedential effect or persuasive value. It would simply be a quick and expeditious means of resolving an undisputed and conceded claim.

A confession of error is not binding on an appellate court, and thus a party's confession of error cannot prevent an appellate court from deciding a claim on the merits if it believes a decision on the merits is appropriate. But, providing the appellate courts with the option of resolving claims, without reaching the merits, based on a confession of error would give the appellate courts more time to consider claims that are disputed by the parties. To me, the proposed modification to the "confession of error" rule would enable an appellate court to conserve, and more effectively allocate, limited judicial resources. I therefore respectfully submit that the supreme court should consider modifying the existing rule.

Craig H. Nakamura