IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Respondent/Plaintiff-Appellee,

vs.

JASON K. UCHIMA,
Petitioner/Defendant-Appellant.

SCWC-17-0000081

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000081; 1DTA-16-01965)

MAY 19, 2020

OPINION BY NAKAYAMA, J., DISSENTING FROM THE JUDGMENT

This court lacks jurisdiction to review the merits of Petitioner/Defendant-Appellant Jason Uchima's (Uchima) untimely application for writ of certiorari (Application). In disregarding the unambiguous statutory language establishing a thirty-day deadline for filing an Application, Hawaiʻi Revised Statutes (HRS) § 602-59(c), the Majority impermissibly expands

our jurisdiction. The Majority justifies this expansion by creating a criminal defendant's right that this court review the merits of the defendant's Application. Such a right has never been recognized and is not expressed by statute.

I dissent from the Majority's holding that this court may review the merits of issues raised in an untimely application for writ of certiorari. Because it is clear to me that this court lacks jurisdiction to review the Intermediate Court of Appeals' (ICA) Judgment on Appeal (JOA) in this case, I do not address the Majority's judgment affirming the ICA's JOA.

I. BACKGROUND

After a bench trial, the District Court of the First Circuit (district court) found Uchima guilty of operating a vehicle under the influence of an intoxicant (OVUII) in violation of HRS § 291E-61(a)(1) and/or (a)(3) and sentenced him to community service, a fine, and a one-year license revocation.

Uchima appealed the district court's judgment to the ICA and the ICA affirmed the district court's judgment. The ICA entered its JOA on March 19, 2018. Thereafter, Uchima filed a motion for an extension of time to file an application for writ of certiorari, which was granted on March 27, 2018. Uchima's statutory deadline to file an Application was extended to May 18, 2018.

On May 24, 2018, six days after the extended deadline,

Uchima filed an untimely Application and a motion to accept the untimely Application (Motion to Accept).

In a declaration by Uchima's counsel (Declaration) attached to the Motion to Accept, Uchima's counsel stated that on May 18, 2018, he finished drafting the Application and believed he had properly efiled it. After the statutory deadline expired, Uchima's counsel realized that he was unable to locate a case for Uchima's Application on the Judiciary Electronic Filing and Service System and discovered that he had not received an email confirming that the case had been created. Uchima's counsel stated that he "cannot say for certain why the case for the application was not created and the Application was not properly efiled on May 18, 2018. Counsel can only guess that it was due to user error or system error on that particular occasion[.]"

In the Motion to Accept, Uchima asks this court to review his Application on the merits despite its untimeliness. The State filed neither an opposition to Uchima's Motion to Accept nor a response to Uchima's untimely Application.

II. DISCUSSION

A. This court lacks jurisdiction to review the merits of Uchima's Application.

This court has held that "[w]e cannot disregard a jurisdictional defect in an appeal and are required to dismiss an appeal on our own motion when we conclude that we lack

jurisdiction." Wylly v. First Hawaiian Bank, 57 Haw. 61, 62, 549 P.2d 477, 479 (1976). This is so because "[a]bsent jurisdiction, this court has no authority to act on the substantive issues posed by an appeal." Korsak v. Hawaii Permanente Med. Grp., 94 Hawaiʻi 297, 303, 12 P.3d 1238, 1244 (2000).

"It is well established that the legislature has the power to set the subject matter jurisdiction of the courts." Alakaʻi Na Keiki, Inc. v. Matayoshi, 127 Hawaiʻi 263, 278, 277 P.3d 988, 1003 (2012). The Legislature circumscribed this court's jurisdiction over decisions of the ICA when it enacted HRS § 602-59(c). HRS § 602-59(c) provides, "[a]n application for 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." (Emphasis added). Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 40.1 similarly provides that "[t]he application [for writ of certiorari] shall be filed within 30 days after the filing of the intermediate court of appeals' judgment on appeal or dismissal order[.]" HRS § 602-59(c) and HRAP Rule 40.1 clearly express that unless an extension is granted, after thirty days the ICA's judgment becomes final and this court no longer has jurisdiction to review the judgment.

In this case, Uchima filed his Application six days after the expiration of the statutory deadline. Irrespective of

the purported reasons for Uchima's untimely filing, this court lacks jurisdiction to consider the merits of Uchima's Application.

B. The Majority's justifications for expanding our jurisdiction are inadequate.

A criminal defendant has no statutory right to appeal to the supreme court. As a result, although we have permitted the review of untimely initial notices of appeal to the ICA in limited circumstances, we have never reviewed the merits of an untimely application for writ of certiorari.

The Majority cites two statutes within HRS Chapter 641, Part II "Appeals in Criminal Proceedings" which provide a criminal defendant the right to appeal from a district or circuit court to the ICA. Majority at 13-14. HRS § 641-11 provides, "[a]ny party aggrieved by the judgment of a circuit court in a criminal matter may appeal to the intermediate appellate court, subject to chapter 602[.]" HRS § 641-11 (2016) (emphasis added). HRS § 641-11's companion statute, HRS § 641-12(a), provides, "[a]ppeals upon the record shall be allowed from all final decisions and final judgments of district courts in all criminal matters. Such appeals may be made to the intermediate appellate court, subject to chapter 602[.]" HRS § 641-12(a) (2016) (emphasis added). Notably, HRS Chapter 641 contains no statutory provision establishing a criminal defendant's right to appeal the

judgment of the ICA to the supreme court. Such a right plainly does not exist.

The Majority nevertheless contends that HRS § 602-59(a)[1] "expressly provides defendants in criminal cases with a statutory right to seek review of the ICA's judgment on appeal or dismissal order." Majority at 14. HRS § 602-59(a) provides

> After issuance of the intermediate appellate court's judgment or dismissal order, a party may seek review of the intermediate appellate court's decision and judgment or dismissal order only by application to the supreme court for a writ of certiorari, the acceptance or rejection of which shall be discretionary upon the supreme court.

By attempting to compare HRS § 602-59 to HRS § 641-11 and HRS § 641-12, the Majority conflates the right to appeal to the ICA on the merits with the ability to seek discretionary review from this court. Petitioners often seek, as is their right, discretionary review by this court after the thirty-day deadline has elapsed, which results in this court dismissing the Application for lack of appellate jurisdiction. Put differently, our dismissal of a criminal defendant's Application for lack of appellate jurisdiction does not run afoul of the defendant's ability to petition the court for discretionary review. The Majority attempts to extract from HRS § 602-59 a criminal

[1] The Majority asserts that HRS § 602-59(a) sets forth a criminal defendant's right to appeal to this court, but at the same time disregards section (c) of that same statute, which expressly limits that right to "no later than thirty days" after the ICA's judgment. HRS § 602-59(c).

defendant's right to have this court review the merits of the defendant's Application. It is difficult to understand how the Majority construes HRS § 602-59(a) to create a right that this court review the merits of an Application when such a right is simply not expressed by the statute. The Majority attempts to derive a new right of a criminal defendant to appeal the ICA's judgment that does not exist and has never before been recognized by this court.

Moreover, the Majority's baseless expansion of our jurisdiction opens the door to requiring this court to review all Applications, irrespective of the Application's timeliness. First, the Majority's expansion of our jurisdiction has no parameters with respect to time. Ostensibly, a criminal defendant may now bring an untimely application for writ of certiorari years after the defendant's statutory filing period has expired. Further, the new rule's only limitation, that this court may review the merits of an untimely Application when it is "plain from the record that defense counsel failed to comply with the procedural requirements for filing the application[,]" Majority at 38, does not significantly limit the jurisdictional expansion. The untimely filing of any represented party's Application evinces counsel's failure to comply with the procedural requirements for filing the Application. One of the

most important procedural requirements for filing an Application is that it be filed within thirty days of entry of the ICA's Judgment on Appeal. See HRS § 602-59(c). If counsel does not file the Application within thirty days of entry of the ICA's Judgment on Appeal, counsel has failed to comply with the procedural requirements set forth by HRS § 602-59(c), whether counsel did not comply with the timeliness requirement due to ineffective assistance or because counsel's client changed his or her mind about seeking review. It is possible that counsel might knowingly file an untimely Application at a client's request, but given this court's lack of jurisdiction to review the merits of an untimely Application, such a filing will likely be uncommon.[2] Though the Majority's opinion limits, on its face, our ability to review untimely Applications to those which demonstrate ineffective assistance of counsel, in actuality the Majority's new rule will render moot, in criminal cases, any procedural

[2] The Majority notes that this new rule will not extend to a petitioner whose counsel declines to take responsibility for the late filing. Majority at 37 ("[C]ounsel will be required to admit responsibility for the late filing."). This will deny petitioners who have suffered ineffective assistance of counsel, but whose counsel continues to neglect counsel's duties by denying responsibility, the opportunity to have this court review the merits of their appeals. That a petitioner who suffers ineffective assistance and whose counsel refuses to admit fault will be denied the benefit of this new rule further underscores the unfairness that will result from ceasing to abide by the thirty-day statutory deadline. Notwithstanding the absence of this court's jurisdiction to consider the merits of an untimely Application, this court should not consider the merits of certain untimely Applications and decline to consider the merits of others when, by definition, the untimely Applications of all represented parties are untimely because counsel failed to comply with the procedural requirements for filing the Application.

requirements for filing an Application, including compliance with statutory deadlines.

Finally, the Majority's argument that a criminal defendant is deprived of due process if the defendant's counsel fails to file a timely Application is unpersuasive because that defendant may seek to redress ineffective assistance by filing a Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 petition. The Majority states that an HRPP Rule 40 petition "may take several years to reach a final resolution." Majority at 32. However, failure to achieve a speedy resolution to appellate review does not violate a defendant's right to due process. The Majority offers no explanation as to how the possibility of a protracted appeal justifies expanding our jurisdiction and defying the clear intent of the Legislature.

In addition, the Majority asserts that a petitioner's HRPP Rule 40 petition "is likely to be an inefficient use of judicial resources." Majority at 34. It is clear to me that a defendant's compliance with existing statutes and case precedent, which will require the defendant to file an HRPP Rule 40 petition if the defendant's attorney fails to file a timely Application, is not "an inefficient use of judicial resources" but is, in fact, the only legally permissible procedure. It is true that this court's disregard of the statutory thirty-day deadline might

result in a speedier resolution than filing an HRPP Rule 40 petition, but it is simply not permitted by law. Moreover, I disagree with the Majority's implication that this court's review of untimely Applications will conserve judicial resources. To the contrary, the Majority's opinion sets a precedent that will require this court to review all Applications irrespective of their compliance with deadlines or other procedural requirements. Significantly more judicial resources will be depleted attempting to meet these additional demands.

III. CONCLUSION

This court lacks jurisdiction to review an untimely Application. Attempting to justify its expansion of our jurisdiction beyond that intended by the Legislature and set by statute, the Majority reads the Hawaiʻi Revised Statutes to confer a statutory right to appeal to this court where none exists.

Because we lack jurisdiction to review Uchima's Application, I do not address the Majority's review of the ICA's JOA. I dissent.

/s/ Paula A. Nakayama