

SCWC-19-0000603

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

JOHANNA DURAN DECKER,  
Petitioner/Defendant-Appellant.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-19-0000603; CASE NO.3DTA-19-00803)

DISSENT OF McKENNA, J., IN WHICH WILSON, J., JOINS

I respectfully disagree with the majority's dismissal of this certiorari application based on untimeliness.

The record lacks a valid waiver of counsel for both trial and appellate purposes. I would therefore accept certiorari, notice plain error affecting substantial rights,<sup>1</sup> vacate the

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<sup>1</sup> Hawai'i Rules of Penal Procedure ("HRPP") Rule 52 provides:

**Rule 52. HARMLESS ERROR AND PLAIN ERROR.**

**(a) Harmless error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

defendant's conviction, and remand the case to the district court for further proceedings.

Although the defendant's certiorari application is being dismissed, the defendant is free to consult with the Office of the Public Defender or other counsel and to file a HRPP Rule 40<sup>2</sup>

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**(b) Plain error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

<sup>2</sup> HRPP Rule 40 provides in pertinent part:

**Rule 40. POST-CONVICTION PROCEEDING.**

**(a) Proceedings and grounds.** The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:

(1) FROM JUDGMENT. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i;

. . . . .

For the purposes of this rule, a judgment is final when . . . the appellate process has terminated.

. . . . .

**(b) Institution of proceedings.** A proceeding for post-conviction relief shall be instituted by filing a petition with the clerk of the court in which the conviction took place. The clerk shall then docket the petition as a special proceeding, and in cases of pro se petitions, promptly advise the court of the petition.

**(c) Form and content of petition.**

(1) IN GENERAL. The petition shall be in substantially the form annexed to these rules. . . .

. . . . .

**(d) Response.** The State of Hawai'i shall be named as the respondent in the petition, and the petitioner shall serve the petition on the respondent by delivering a filed copy thereof to the prosecutor. Service may be made by the attorney for the petitioner, or the petitioner in a pro se case. If it appears that the petitioner is unable to

petition in state court for post-conviction relief based on the violation of her state and federal constitutional right to counsel. If that petition is unsuccessful, the defendant may be able to consult with the Federal Public Defender's office to seek advice regarding possible relief in federal court based on the deprivation of the defendant's right to counsel under the federal constitution. See Gideon v. Wainwright, 372 U.S. 335 (1963).

The majority dismisses this certiorari application because it was a few days late. (The application would have been timely if the defendant had timely requested an automatic thirty-day extension to file a certiorari application.) The majority dismisses the application despite this court's previous

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effect prompt service of a filed copy of the petition or other pleading under this rule, the court shall direct court staff to effect service on behalf of the petitioner. Within 30 days after the service of the petition or within such further time as the court may allow, the respondent may answer or otherwise plead, but the court may require the State to answer at any time. Where the petition makes a showing of entitlement to immediate relief, the court may shorten the time in which to respond to the petition. The respondent shall file with its answer any records that are material to the questions raised in the petition which are not included in the petition.

. . . . .

**(f) Hearings.** If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. . . .

. . . . .

**(i) Indigents.** If the petition alleges that the petitioner is unable to pay the costs of the proceedings or to afford counsel, the court shall refer the petition to the public defender for representation as in other penal cases. . . .

acceptance of a late-filed certiorari application based on ineffective assistance of counsel. See State v. Uchima, 147 Hawai‘i 64, 464 P.3d 852 (2020). As the Chief Justice stated in his concurrence in Uchima, “[w]here . . . the defendant is denied [their] right to seek this court’s review due solely to the failings of the counsel to which [they are] entitled, we may excuse a procedural deficiency if justice so requires.” Uchima, 147 Hawai‘i at 88, 464 P.3d at 876 (Recktenwald, C.J., concurring) (footnote omitted).

In this case, the defendant is not even represented by counsel. She does not raise lack of counsel as an issue or explain why the certiorari application was a few days late. Because she is not represented by an attorney, however, I believe the situation is more problematical than that in Uchima.

The record reveals that in the underlying district court case, 3DTA-19-00803, after the defendant’s March 21, 2019 arrest for driving without a license and without insurance, she appeared in custody at her March 22, 2019 arraignment. On that day, she was represented by a deputy public defender. She was released on her own recognizance and referred by the district court to the public defender’s office.

The record does not reflect what happened thereafter and does not contain a waiver of counsel before the defendant’s conviction and notice of appeal to the Intermediate Court of

Appeals ("ICA"). The defendant's August 28, 2019 in forma pauperis application for her appeal to the ICA indicates she was unemployed.

After the defendant's pro se notice of appeal, on January 21, 2020, the ICA filed an order of temporary remand for the district court to address whether the defendant had waived her right to counsel on appeal.

Upon remand, on February 18, 2020, the defendant apparently signed a waiver of counsel form that purportedly waived her right to counsel in the district court case for which she had already been convicted. The form did not waive her right to counsel as to the appeal, which was the subject of the ICA's remand order. The form states in part, "I understand that upon conviction I have the right to appeal the Judgment and Sentence of the Court within 30 days with the assistance of appointed counsel, if I cannot afford one. . . ."

Thus, the form apparently signed by the defendant did not address her right to counsel on appeal, which was the subject of the ICA's temporary remand order. In addition, to the extent it purported to be a waiver of trial counsel, it was an ineffective retroactive waiver. Despite this, the ICA affirmed the

defendant's conviction in its June 24, 2020 summary disposition order.<sup>3</sup>

This court has long held that a defendant's waiver of the right to counsel must be voluntarily, knowingly, and intelligently made. See State v. Tarumoto, 62 Haw. 298, 300, 614 P.2d 397, 399 (1980). "[A]lthough a waiver must be knowing and intentional, it 'may be expressed or implied,' meaning 'it may be established by express statement or agreement, or by acts and conduct from which an intention to waive may be reasonably inferred.'" In re Contested Case Hearing on the Water Use Permit Application Originally Filed by Kukui (Molokai), Inc., 143 Hawai'i 434, 441, 431 P.3d 807, 814 (2018) (quoting Coon v. City & Cty. of Honolulu, 98 Hawai'i 233, 261, 47 P.3d 348, 376 (2002)). With regard to a waiver of the right to counsel by conduct, a "[w]aiver may be shown by conduct of an unequivocal nature." Tarumoto, 62 Haw. at 300, 614 P.2d at 399. See Grindling v. State, 144 Hawai'i 444, 450, 445 P.3d 25, 31 (2019).

The record does not contain the defendant's "conduct of an unequivocal nature" waiving her right to counsel.

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<sup>3</sup> The defendant then filed a motion on July 2, 2020 requesting transcripts without charge. The ICA summarily denied this request in a July 20, 2020 order, despite it being "well-settled that an indigent criminal defendant has a right to transcripts of prior proceedings." State v. Mundon, 121 Hawai'i 339, 357, 219 P.3d 1126, 1144 (2009) (citing Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

The erroneous deprivation of the right to counsel under the federal constitution as well as article I, section 14 of the Hawai‘i constitution is structural error not subject to harmless error analysis; no showing of prejudice is required in part because the denial of counsel is “so likely to prejudice the accused that the cost of litigating [its] effect in a particular case is unjustified[,]” United States v. Cronic, 466 U.S. 648, 658 (1984) (footnote omitted), and because these “circumstances involve impairments of the Sixth Amendment right that are easy to identify and . . . easy for the government to prevent.” Strickland v. Washington, 466 U.S. 668, 692 (1984); see also State v. Loher, 140 Hawai‘i 205, 221, 398 P.3d 794, 810 (2017) (citation omitted); State v. Reed, 135 Hawai‘i 381, 389, 351 P.3d 1147, 1155 (2015) (“Because the denial of the right to counsel of choice is a structural error, we need not subject the court’s abuse of discretion to a harmless error analysis.”). Therefore, an erroneous deprivation of the right to counsel constitutes an abuse of discretion not subject to harmless error analysis. See also Akau v. State, 144 Hawai‘i 159, 162, 439 P.3d 111, 114 (2019).

I therefore believe we should notice plain error based on the deprivation of the defendant’s right to counsel. I respectfully dissent from the majority’s order dismissing the certiorari application. Despite the majority’s rejection of

certiorari, as discussed above, the defendant is not without remedy. I see no reason, however, why the defendant's remedy should be delayed.

DATED: Honolulu, Hawai'i, October 20, 2020.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

