NO. 22099

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Respondent-Appellee,

vs.

JOHN E. SINAGOGA, Petitioner-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 93-0421)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and
Ramil, JJ., and Circuit Judge Ahn,
in place of Acoba, J., recused)

Petitioner-appellant John E. Sinagoga timely petitioned this court for a writ of certiorari, which we granted, to review the decision of the Intermediate Court of Appeals (ICA) in State v. Sinagoga, No. 22099 (Haw. Ct. App. Aug. 23, 2000) (mem.) [hereinafter, ICA op.], affirming the circuit court's November 6, 1998 order of revocation of probation and resentencing. For the reasons set forth below, we also affirm the circuit court's order, but on different grounds.

I. BACKGROUND

The facts of the underlying case, Criminal No. (CR No.) 93-0421, are set forth in detail in the ICA decision. ICA op. at 1-7. The following table briefly outlines the relevant events:

February 12, 1993	Sinagoga was arrested and incarcerated for charges later prosecuted in CR No. 93-0421.
September 29, 1993	Sinagoga pled no contest to one and guilty to two counts of terroristic threatening, was convicted on all three counts, and was sentenced to five year terms of incarceration for each count, to be served consecutively. The sentence imposed was a sua sponte departure from the plea agreement.
April 19, 1996	On appeal, the ICA affirmed the underlying convictions but vacated the sentence and remanded for resentencing with instructions to provide Sinagoga an opportunity to challenge the constitutionality of his prior convictions.[1]
July 5, 1996	On remand, in accord with the original plea agreement, Sinagoga was resentenced to three concurrent five-year terms of probation, with a special condition of one year in jail. Credit for time already served was applied to Sinagoga's special condition of imprisonment. Despite Sinagoga's request that his sentence commence on September 29, 1993, the circuit court ordered probation to commence on July 5, 1996. Sinagoga did not appeal this sentence, and no post-judgment motions were filed.
July 11, 1996	Sinagoga was released from incarceration. ICA memo. op. at 6 n.3.

[1] See State v. Sinagoga, 81 Hawai'i 421, 435, 918 P.2d 228, 242 (App. 1996) (holding, inter alia, that, if a sentencing court considers a defendant's prior convictions in imposing consecutive, rather than concurrent, terms of imprisonment, the court must ensure that any convictions relied upon were counseled ones).

May 20, 1998	Sinagoga was found guilty of two counts of terroristic threatening in CR No. 97-0711.
June 18, 1998	The prosecution filed its motion to revoke Sinagoga's probation in CR No. 93-0421.
November 6, 1998	The circuit court entered its order of revocation of probation and resentencing in CR No. 93-0421, sentencing Sinagoga to three concurrent terms of five years of incarceration, with credit for time served. In CR No. 97-0711, the court sentenced Sinagoga to two concurrent ten-year terms with a mandatory minimum of one year and eight months, to run consecutively to his sentence in CR No. 93-0421.
December 3, 1998	Sinagoga appealed from the circuit court's order of revocation and resentencing in CR No. 93-0421.

On appeal before the ICA, Sinagoga claimed that his July 5, 1996 sentence was illegal because the three years and five months he had spent incarcerated was not credited towards his probation sentence. Thus, according to Sinagoga, his sentence should have expired on February 11, 1998, five years after he was originally arrested and before the circuit court granted the prosecution's June 18, 1998 motion to revoke his probation and resentence him. The ICA examined the legality of the July 5, 1996 sentence and concluded it violated neither Hawai‘i Revised Statutes (HRS) § 706-609 (1993)[2] nor HRS § 706-671

[2] HRS § 706-609 provides: "When a conviction or sentence is set aside on direct or collateral attack, the court shall not impose a new sentence for (continued...)

(1993).[3] ICA op. at 11. Additionally, the ICA noted that, at the July 5, 1996 hearing, Sinagoga requested that his sentence run from his original date of sentencing. The ICA concluded that, even if the circuit court had granted Sinagoga's request, he would have been on probation up to and including September 28, 1998, during which time the prosecution filed its June 18, 1998 motion for resentencing. Id. Thus, the ICA affirmed the circuit court's November 6, 1998 order of resentencing.

In his timely application for a writ of certiorari, Sinagoga again argued that the time he had spent incarcerated prior to resentencing in CR No. 93-0421 should have been credited towards his five-year probation sentence. This court granted Sinagoga's application on September 28, 2000.

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[2](...continued)
the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence."

[3] HRS § 706-671 provides in relevant part:

> (1) When a defendant who is sentenced to imprisonment has previously been detained in any State or local correctional or other institution following the defendant's arrest for the crime for which sentence is imposed, such period of detention following the defendant's arrest shall be deducted from the minimum and maximum terms of such sentence. . . .
>
> (2) When a judgment of conviction or a sentence is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the minimum and maximum terms of the new sentence.

II. DISCUSSION

Sinagoga ostensibly appealed from the circuit court's November 6, 1998 order of revocation and resentencing. However, as noted supra, Sinagoga's sole argument before the ICA was that the sentence he received on July 5, 1996 was illegal and, therefore, his probation sentence should have ended on February 11, 1998, before the prosecution filed its June 18, 1998 motion to revoke Sinagoga's probation.[4]

"[A] court's jurisdiction to consider matters brought before it is a question of law, which is subject to de novo review on appeal applying the 'right/wrong' standard." State v. Lorenzo, 77 Hawai'i 219, 220, 883 P.2d 641, 642 (App. 1994) (citations omitted). Regarding appellate jurisdiction, this court has stated,

> The right of appeal in a criminal case is purely statutory and exists only when given by some constitutional or statutory provision. Therefore, the right of appeal and, by extension, the parameters of appellate jurisdiction, are limited as provided by the legislature through statute. Hence, compliance with the methods and procedures prescribed by statute is obligatory.

State v. Irvine, 88 Hawai'i 404, 406, 967 P.2d 236, 238 (1998) (quoting Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995)). HRS § 641-11 (1993) governs appeals from circuit courts and states inter alia:

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[4] Sinagoga does not challenge that his additional felony convictions were a sufficient basis to revoke probation.

> Any party deeming oneself aggrieved by the judgment of a circuit court in a criminal matter, may appeal to the supreme court, subject to chapter 602 in the manner and within the time provided by the Hawai‘i Rules of Appellate Procedure. The sentence of the court in a criminal case shall be the judgment.

The manner and time for filing an appeal in a criminal case is governed by Hawai‘i Rules of Appellate Procedure (HRAP) Rule 4(b) (1996), which provides in pertinent part: "In a criminal case, whether the appeal is one of right or is an interlocutory appeal, the notice of appeal by a defendant shall be filed in the circuit or district court within 30 days after the entry of the judgment or order appealed from." Moreover, "[a]s a general rule, compliance with the requirement of the timely filing of a notice of appeal is jurisdictional, and we must dismiss an appeal on our motion if we lack jurisdiction." Grattafiori v. State, 79 Hawai‘i 10, 13, 897 P.2d 937, 940 (1995) (internal quotation marks, citations, and brackets omitted).

Through his appeal of the November 6, 1998 order of revocation and resentencing, Sinagoga attempts to attack the sentence entered on July 5, 1996, over twenty-eight months before his notice of appeal was filed. Clearly, the HRAP Rule 4(b) thirty-day time limit within which to challenge the July 5, 1996 judgment had long expired before the present appeal was taken. Therefore, the sentence entered on July 5, 1996 was a presumptively valid judgment, see State v. Makaila, 79 Hawai‘i 40, 45, 897 P.2d 967, 972 (1995), and the ICA lacked jurisdiction

to consider it. See State v. Johnson, 96 Hawai‘i 462, 468, 32 P.3d 106, 112 (App.) (holding that the ICA did not have jurisdiction to consider the defendant's arguments on appeal because the defendant's appeal from a subsequent motion to withdraw a plea did not reopen the prior final judgment to attack), reconsideration denied, 96 Hawai‘i 462, 32 P.3d 106, cert. denied, 96 Hawai‘i 462, 32 P.3d 106 (2001).

In its opinion, the ICA concluded that the Hawai‘i Rules of Penal Procedure (HRPP) Rule 35[5] authorized it to decide the legality of the July 5, 1996 sentence. ICA op. at 9. HRPP Rule 35, however, is the remedy expressly provided by law that grants trial courts the discretion to correct or modify sentences. See, e.g., State v. Williams, 70 Haw. 566, 569, 777 P.2d 1192, 1194 (1989); State v. Putnam, 93 Hawai‘i 362, 365 n.4, 3 P.3d 1239, 1242 n.4. And, while both this court and the ICA have appellate jurisdiction to review a trial court's ruling on

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[5] HRPP Rule 35 (1996) states:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

an HRPP Rule 35 motion under HRS § 602-5 (1993),[6] nothing in HRS § 602-5 grants either court original jurisdiction over such a motion.

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[6] HRS § 602-5 provides in pertinent part:

> The supreme court shall have jurisdiction and powers as follows:
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> (1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it on any appeal allowed by law from any other court or agency;
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> (2) To answer, in its discretion, any question of law reserved by a circuit court, the land court, or the tax appeal court, or any question or proposition of law certified to it by a federal district or appellate court if the supreme court shall so provide by rule;
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> (3) To entertain, in its discretion, any case submitted without suit when there is a question in difference which might be the subject of a civil action or proceeding in the supreme court, circuit court, or tax appeal court, and the parties agree upon a case containing the facts upon which the controversy depends;
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> (4) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law;
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> (5) To issue writs of habeas corpus, or orders to show cause as provided by chapter 660, returnable before the supreme court or a circuit court, and any justice may issue writs of habeas corpus or such orders to show cause, returnable as above stated;
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> (6) To make or issue any order or writ necessary or appropriate in aid of its appellate or original jurisdiction, and in such case any justice may issue a writ or an order to show cause returnable before the supreme court;
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> (7) To make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

III. CONCLUSION

Based on the foregoing, we, like the ICA, lack jurisdiction to consider Sinagoga's untimely attack upon his July 5, 1996 sentence. We do, however, as did the ICA, have jurisdiction to review Sinagoga's appeal of the November 6, 1998 order of revocation and resentencing. Inasmuch as Sinagoga presents no argument other than his untimely attack on the July 5, 1996 sentence in this appeal, we affirm the circuit court's November 6, 1998 order.

DATED: Honolulu, Hawai'i, March 6, 2002.

Jack Schweigert, for
petitioner-appellant,
on the writ

Alexa D. M. Fujise,
Deputy Prosecuting Attorney,
for respondent-appellee