NO. 24337

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
WESLEY WONG, JR., Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 00-01-0398(2))

ORDER DISMISSING APPEAL
(By: Burns, C.J., Lim and Foley, JJ.)

Wesley Wong, Jr. (Wong) appeals the May 9, 2001 judgment of the circuit court of the second circuit, the Honorable Shackley F. Raffetto, judge presiding, that convicted him, upon a jury's verdict, of the offense of prohibited vehicles and transportation, in violation of Hawai'i Administrative Rules (HAR) § 13-104-11(a)(2) (1993)[1] and Hawaii Revised Statutes (HRS) § 183-2 (1993),[2] and sentenced him to a $1,000.00 fine and seventy-five hours of community service.

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[1] Hawai'i Administrative Rules § 13-104-11(a)(2) (1993) provides: "The following acts are prohibited within a forest reserve: . . . . To launch or land airplanes, gliders, helicopters, balloons, parachutes, or other similar means of transportation without a special use permit from the board [of land and natural resources] or its authorized representative; provided, however, that landing is authorized without a permit in case of any emergency[.]"

[2] Hawaii Revised Statutes (HRS) § 183-2 (1993) provides: "Subject to chapter 91, the department [of land and natural resources] shall adopt, amend, and repeal rules for and concerning the preservation, protection, regulation, extension, and utilization of forest reserves designated by the department. All rules shall have the force and effect of law."

The charge[3] giving rise to Wong's conviction and sentence read as follows:

> COUNT II: On or about the 7th day of May 1999, in the County of Maui, State of Hawaii, WESLEY WONG, JR. within a forest reserve did launch or land a helicopter or other similar means of transportation without a special use permit from the board of land and natural resources or its authorized representative, and the landing was not in case of an emergency, thereby committing the offense of Prohibited Vehicles and Transportation in violation of Section 13-104-11(a)(2) of the Hawaii Administration Rules of the Department of Land and Natural Resources and Section 183-2 of the Hawaii Revised Statutes.

The forest reserve in question was established in 1912 by a proclamation of Territorial Governor Walter F. Frear. The proclamation established, as the Moloka'i Forest Reserve, "those certain pieces of government and privately owned land on the Island of Molokai," first roughly described, then described by map reference, then described by metes and bounds, in the proclamation, which metes and bounds description ended with the following:

> Excepting and reserving therefrom all the cultivated or agricultural land in the valleys of Halawa, Wailau, Pelekunu and Waikolu, and all land in Waikolu and Makanalua that may be used or required for public purposes, and all flat land along the shore at the foot of the bluff; also, on the privately owned land of Mapulehu, Kainalu and Puniuohua 1 & 2, such areas of grazing land as may lie between the forest line herein described and forest fences now existing or to be constructed by the owners of those lands.

The proclamation then continued and ended as follows:

> AND, as provided by law, subject to the existing leases, I do hereby SET APART as parts of the Molokai Forest Reserve those portions of the Government lands known as Kalamaula (1621 acres), Kapaakoa (220 acres), Kamiloloa 1 (490 acres), Kamiloloa 2 (550 acres), Makakupaia mauka (490 acres), Puaahala (163 acres), East Ohia (220 acres), Kahananui (182 acres[),] Ualapue (194 acres), Pukoo (124 acres), Ahaino

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[3] Defendant-Appellant Wesley Wong, Jr. (Wong) was also charged, in count I of the complaint, with the offense of possession or use of electrofishing devices, in violation of HRS § 188-23(a) (1993). The jury found Wong not guilty of count I, and the court acquitted Wong of that charge.

(96 acres), Honouliwai (378 acres), and Wailau (8540 acres) on the Island of Molokai, altogether an area of 13,268 acres, more or less, that lie within the metes and bounds of the above described Molokai Forest Reserve.

Wong presents a single point of error on appeal,

that the evidence, even when viewed in the light most favorable to the State, was not sufficiently substantial to support a conclusion by the trier of fact that the particular place in Wailau Valley, Molokai where [Wong] was dropped off and picked up in a helicopter was within the "forest reserve".

Opening Brief at 4. The supporting argument Wong presents in his October 4, 2001 opening brief is, in its entirety and including its record citations, as follows:

[Wong] was invited to join his son Matt Wong for a day of hihiwai gathering in Wailau Valley, Molokai. Matt Wong arranged with his helicopter pilot friend, Donald Shearer of Maui's Windward Aviation (Shearer Tr. 5) to be dropped off by helicopter on a day when Shearer was going to and from Honolulu. (Shearer Tr. 7) On May 7, 1999, Shearer dropped Matt Wong and [Wong] off in Wailau Valley by landing his helicopter in an abandoned taro patch. (Shearer Tr. 8-9) Mr. Shearer put an "X" on a Tax Key Map showing the approximate place where he landed the helicopter. (Shearer Tr. 11, State's Exhibit 2) The Tax Key Map shows the general area as "forest reserve".

The Molokai Forest reserve was established by Governor Frear's Proclamation of 1912 (State's Exhibit 4; see: appendix) pursuant to Section 183-11 HRS, as amended. The Proclamation contains an important exemption:

"Excepting and reserving therefrom all the cultivated or agricultural land in the valleys of . . . Wailau . . .".

Proclamation Of Forest Reserve On The Island Of Molokai County Of Maui Territory Of Hawaii dated Sept. 11, 1912 by Walter F. Frear, Governor of Hawaii.

This exception was addressed in the testimony of Robert Hobdy, State of Hawaii District Manager for Maui County, Division of Forestry and Wildlife, Department of Land and Natural Resources:

[referring to 1912 Proclamation]

Q. Has it ever been decided by the department or any other agencies as far as you know when they say -- when it says cultivated land, whether that means cultivated at the time of the proclamation, or when are they talking about? Has that ever been decided?

A. The issue has never really, come up. It has not been tested or contested.

Q. So it hasn't been decided as far [(sic)] you know?

A. No.

Q. So if there is an old taro patch say in Wailau Valley, can you say for sure whether that's in the forest reserve or not?

A. Well, there's a lot of potential questions as to whether it means current agriculture or Watson and culture [(sic)], or you know there's different possibilities.

> Q. So you can't say definitively one way or the other?
> A. No, it is quite unclear to me how this would be applied.
> (Hobdy Tr. 10-11.)
>
> The exception clause has never been definitively interpreted. The uncontroverted facts of our case establish that the helicopter was landed in an area described as an abandoned taro patch. This Court should judicially notice that a taro patch is cultivated or agricultural land. There was no evidence indicating when the land was used agriculturally. Therefore, given the state of the record, a man of reasonable caution could not conclude that the particular landing and launching place utilized by [Wong] was in the "forest reserve" because the place at issue in our case may have been included in the exception clause of the Proclamation of 1912.

Opening Brief at 6-8 (bold-face type and some bracketed material in the original).

In its October 25, 2001 answering brief, the State first describes the evidence presented at trial. The State's description of the evidence, in pertinent part and inclusive of its record citations, is as follows:

> On February 21, 2001, Donald Shearer testified. He testified that on May 7, 1999 he gave Matt Wong and [Wong] a ride to Molokai on his helicopter. He further testified that [Wong] showed him where in Wailau Valley they wanted to be dropped off. Shearer testified that he dropped them off and picked them up in an abandoned taro patch. (Transcript of 2/21/2000 (Donald Shearer) at 6:14-7:5, 8:18-9:17) Shearer indicated by putting an "x" on State's Exhibit 2 the area where he dropped them off and later picked them up. State's Exhibit 2 was a certified copy of a tax map of Wailau Valley. (Transcript of 2/21/2000 (Donald Shearer) at 10:17-11:12; State's Exhibit 2, entered into evidence) The area where the "x" was located was in the area marked on the map as a "forest reserve". (State's Exhibit 2, entered into evidence)
> . . . .
>
> Matt Wong testified that Donald Shearer took him and his father to Wailau Valley on a family outing. (Transcript of 2/27/2000 (Matt Wong) at 5:3-20) Matt Wong marked on State's Exhibit 1 the general area where the helicopter landed in Wailau Valley. He, however, was unsure as to the exact area and placed two xs on the map. (Transcript of 2/27/2000 (Matt Wong) at 23:12-24:5; State's Exhibit 1, entered into evidence) State's Exhibit 1 was also a certified copy of a tax map of Wailau Valley. Matt Wong placed the two xs next to Wailau Stream. In the area where Matt Wong had placed the xs on the tax map was in parentheses the notation "FR 8540 Ac". (State's Exhibit 1, entered into evidence)
>
> Michael Buck, who was the Administrator of the Division of Forestry and Wildlife, Department of Land and Natural Resources, State of Hawaii, also testified. He testified that no one including Donald Shearer, [Wong] and Matt Wong had a permit to launch or land a helicopter in Wailau Forest Reserve on May 7, 1999. Moreover he testified that state employees who were on vacation would need a permit

> to land or launch a helicopter in a forest reserve. (Transcript of 2/21/2000 (Michael Buck) at 30:3-22) There was a stipulation that [Wong] and Matt Wong were on vacation on May 7, 1999. (Transcript of 2/21/2000 at 31:13-21)
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> Robert Hobdy testified that he was the district manager for Maui of the Division of Forestry and Wildlife, Department of Land and Natural Resources, State of Hawaii. (Transcript of 2/27/2000 (Robert Hobdy) at 3:13-14) He testified that the cultivated land in Wailau Valley was exempted from becoming part of the forest reserve in the Proclamation of Forest Reserve on the Island of Molokai. He further testified that it hadn't been decided if that meant cultivated land at the time of the proclamation or when. (Transcript of 2/27/2000 (Robert Hobdy) at 10:2-11:13) Hobdy also testified that there were many private kuleanas where Wailau Stream entered the ocean. In these old kuleanas there were a lot of taro patches and banana farms. These old kuleanas were shown on State's Exhibit 17. (Transcript of 2/27/2000 (Robert Hobdy) at 22:1-20; State's Exhibit 17, entered into evidence)

Answering Brief at 1-3. The State's entire argument thereupon is as follows:

> Donald Shearer indicated on State's Exhibit 2 the area where [Wong] instructed him to land his helicopter and where he later picked him up. The area where Shearer landed the helicopter was clearly labeled as part of the Molokai Forest Reserve on State's Exhibit 2.
>
> Matt Wong also indicated on a map the area where he and his father landed. That area was clearly labeled forest reserve. Further that area was clearly part of the 8540 acres of government land known as Wailau that became part of the Molokai Forest Reserve.
>
> Clearly then there was substantial evidence to support the jury's finding that the helicopter carrying [Wong] and his son landed in a forest reserve.
>
> . . .
>
> [Wong] argues that the exception for cultivated or agricultural lands may have included the area used by [Wong], and thus there was insufficient evidence for a mean [(sic)] of reasonable caution to conclude that the particular landing and launching area used was a forest reserve.
>
> The area used by [Wong] for landing and launching the helicopter was part of the government lands set aside as part of the Molokai Forest Reserve. It was part of the government lands known as Wailau and was comprised of 8540 acres. In the language setting aside the government lands to be part of the forest reserve there was no exception for agricultural or cultivated lands, and thus that exception did not apply. The exception only applied to those privately owned lands which had been set aside to become the Molokai Forest Reserve. These privately owned lands included the private kuleanas located in the area where the ocean met Wailau Stream described by Robert Hobdy.

Answering Brief at 4-5.

Wong's point of error on appeal, insufficiency of the evidence, in and of itself implies a searching review by the

appellate court of the evidence adduced at Wong's jury trial.[4] And the arguments of the parties quoted above confirm that this appeal rests squarely upon such evidence -- specifically, the testimony of the witnesses at trial. Although the record on appeal contains the court file and the exhibits admitted into evidence at trial, Wong has failed to include any transcripts of the trial itself in the record on appeal.

On June 6, 2001, Wong designated the record on appeal as "all of the Court's minutes, records, pleadings, exhibits in evidence, as well as transcripts of Michael Buck, Bob Hobdey [(sic)], and Donald Shearer of the testimony presented and arguments made in the above captioned case." The index to the record on appeal, filed in the supreme court on August 6, 2001,

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[4] In considering whether evidence adduced at trial is sufficient to support a conviction, we are guided by the following principles:

> On appeal, the test for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact. State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992); State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981). "'It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction.'" Ildefonso, 72 Haw. at 576-77, 827 P.2d at 651 (quoting Tamura, 63 Haw. at 637, 633 P.2d at 1117). "'Substantial evidence' . . . is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." See id. at 577, 827 P.2d at 651 (quoting State v. Naeole, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1992). "Furthermore, 'it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence[.]'" Tachibana v. State, 79 Hawai'i 226, 239, 900 P.2d 1293, 1306 (1995) (citation omitted).

noted with regard to transcripts: "None formally requested by Appellant or Appellee." On October 2, 2001, the parties filed a stipulation for correction of record, in which they agreed, "pursuant to Hawaii Rules of Appellate Procedure, Rule 10(e)(2)(A),[5] that the record be corrected to include transcripts of the trial testimony of Don Shearer, Robert Hobdy and Michael Buck." In a declaration attached to the stipulation, Wong's attorney deposed:

> 1. I am counsel for [Wong] in the above-entitled case;
> 2. Transcripts for trial testimony of Don Shearer, Robert Hobdy and Michael Buck, although described in the Designation of Record on Appeal, were accidentally neither prepared nor transmitted with the record on appeal.
> 3. Said transcripts have been prepared and are ready to be transmitted to the appellate court. [Wong's] Opening Brief has been completed and no delay of the appeal will be occasioned by this correction of the record.

However, the supreme court, on October 3, 2001, ordered that "the stipulation is not approved without prejudice to a subsequent stipulation or motion that indicates the date of the transcript and whether the transcript has been filed by the court reporter at the second circuit court." Apparently, and inexplicably, the simple further expedient indicated by the supreme court has not been taken.

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[5] Hawai'i Rules of Appellate Procedure Rule 10(e)(2) (2001) provides that "[i]f anything material to any party is omitted from the record by error or accident or is misstated therein, corrections or modifications may be as follows: (A) by stipulation of the parties; or (B) by the court or agency appealed from, either before or after the record is transmitted; or (C) by direction of the appellate court before which the case is pending, on proper suggestion or its own initiative." (Format modified.)

According to Hawai‘i Rules of Appellate Procedure (HRAP) Rule 10(a)(4) (2001), "[t]he record on appeal shall consist of . . . . the transcript of any proceedings prepared pursuant to the provisions of Rule 10(b)[.]" HRAP Rule 10(b)(1)(A) (2001) places on the appellant the affirmative burden of providing the transcript of the proceedings:

> When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file.

Thus, it is well settled that "'[t]he burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.'" Bettencourt v. Bettencourt, 80 Hawai‘i 225, 230, 909 P.2d 553, 558 (1995) (brackets omitted) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)). See also Lepere v. United Pub. Workers, Local 646, 77 Hawai‘i 471, 474, 887 P.2d 1029, 1032 (1995) ("Lepere, as appellant, had a duty to include the relevant transcripts of proceedings as a part of the record on appeal." (Footnote omitted.)); State v. Hawaiian Dredging Co., 48 Haw. 152, 158, 397 P.2d 593, 598 (1964) ("It is elementary that an appellant must furnish to the appellate court a sufficient record to positively show the alleged error." (Citation omitted.)); Marn v. Reynolds, 44 Haw. 655, 663, 361 P.2d 383, 388 (1961)

(transcript of proceedings must be provided to the appellate court unless "evidence is not necessary for the disposition of an appeal on its merits" (citation omitted)); Ling v. Yokoyama, 91 Hawai'i 131, 135, 980 P.2d 1005, 1009 (App. 1999); Costa v. Sunn, 5 Haw. App. 419, 430, 697 P.2d 43, 50 (1985); Johnson v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 178, 664 P.2d 262, 265 (1983); Hawaiian Trust Co., Ltd. v. Cowan, 4 Haw. App. 166, 168, 663 P.2d 634, 636 (1983).

In addition, HRAP Rule 10(b)(3) (2001) provides:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

In Union Bldg. Materials Corp., supra, we held that

> if the appellant wishes to urge that a finding or conclusion is unsupported by the evidence, he must include a transcript of all the evidence relevant to such finding or conclusion. . . . An appellant . . . has the burden to designate all the evidence, good and bad, material to the point he wishes to raise.
>
> The law is clear in this jurisdiction that the appellant has the burden of furnishing the appellate court with a sufficient record to positively show the alleged error. An appellant must include in the record all of the evidence on which the lower court might have based its findings and if this is not done, the lower court must be affirmed.

Union Bldg. Materials Corp., 5 Haw. App. at 151-52, 682 P.2d at 87 (citations omitted). Thereupon, we concluded:

> The state of the appellate record is such that all of the evidence presented to the trial court is not presented here and we have no way of knowing if the evidence omitted is relevant. Therefore, we cannot say that the court's findings are not supported by substantial evidence and are clearly erroneous.

Id. at 153, 682 P.2d at 88. See also State v. Goers, 61 Haw. 198, 202-3, 600 P.2d 1142, 1144-45 (1979); Hawaiian Trust Co., Ltd., 4 Haw. App. at 168, 663 P.2d at 636; Marn, 44 Haw. at 663,

361 P.2d at 388.

Apparently Wong at some point discovered his omission and took some steps to include the transcripts in the record on appeal. He did not, however, ultimately remedy the omission and thus fulfill his responsibility to ensure that the record as constituted is adequate to carry his case on appeal. HRAP Rule 11(a) (2001) ("After the filing of the notice of appeal, the appellant . . . shall comply with the provisions of [HRAP] Rule 10(b) and shall take any other action necessary to enable the clerk of the court to assemble and transmit the record."). See also Bettencourt, 80 Hawai'i at 231, 909 P.2d at 559 ("it is counsel's responsibility to review the record once it is docketed and if anything material to counsel's client's case is omitted or misstated, to take steps to have the record corrected" (brackets, citation and internal quotation marks omitted) (referring to the then-applicable Hawai'i Rules of Civil Procedure Rule 75(d), the predecessor court rule to HRAP Rule 10(e)(2) (2001), supra n. 5). Hence, we must dismiss Wong's appeal. See Bettencourt, 80 Hawai'i at 231, 909 P.2d at 559; Goers, 61 Haw. at 202-3, 600 P.2d at 1144-45; Marn, 44 Haw. at 664, 361 P.2d at 389; Johnson, 4 Haw. App. at 178-79, 664 P.2d at 265-66; Hawaiian Trust Co., Ltd., 4 Haw. App. at 168, 663 P.2d at 636;. As we have stated,

> the burden is on appellant to convince the appellate body that the presumptively correct action of the circuit court is incorrect. To that end, an appellant is required to file a notice of appeal, order the transcript of the proceedings below, and arrange for transmission of the record. The burden is upon appellant to comply with the rules. The

> only positive requirement placed on an appellee is to file an answering brief, except where appellee files a cross-appeal, or may wish to respond to an act by appellant. So great is the burden on appellant to overcome the presumption of correctness that appellee's failure to file an answering brief does not entitle appellant to the relief sought from the appellate court, even though the court may accept appellant's statement of facts as correct.

Costa, 5 Haw. App. at 430, 697 P.2d at 50-51 (internal citations omitted).

Therefore,

IT IS HEREBY ORDERED that Wong's appeal is dismissed.

DATED: Honolulu, Hawaii, January 7, 2003.

On the briefs:

Philip H. Lowenthal,
Joel E. August,
Lowenthal & August,
for defendant-appellant.

Chief Judge

Associate Judge

Dwight K. Nadamoto,
Deputy Attorney General,
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Associate Judge