

NOT FOR PUBLICATION

NO. 25979

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
CHUNG HEE HAN, Defendant-Appellant

ENRIQUARDO  
OF THE APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,  
EWA DIVISION  
(HPD CR. NO. 01334810)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Foley and Nakamura, JJ.)

Defendant-Appellant Chung Hee Han (Han) appeals the judgment filed on October 16, 2003 in the District Court of the First Circuit, Ewa Division (district court).<sup>1/</sup> The district court found Han guilty of Harassment in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2004)<sup>2/</sup> and sentenced him to 30 hours of community service and ordered him

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<sup>1/</sup> The Honorable Rhonda A. Nishimura presided.

<sup>2/</sup> Hawaii Revised Statutes (HRS) § 711-1106 (Supp. 2004) provides in relevant part:

**§711-1106 Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

(a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]  
.....

(2) Harassment is a petty misdemeanor.

to pay a \$25 Crime Victim Compensation Special Fund (CVCSF) fee and amended restitution in the amount of \$2,156.95.

On appeal, Han claims the following: (1) he received ineffective assistance of counsel as a result of his attorney's failure to object to the entry into evidence of the photograph depicting the injuries of the complainant, Jun Tae Lim (Lim), and failure to call percipient witnesses or provide expert testimony in rebuttal during the restitution hearing; (2) the district court erred in failing to enter into the record findings of fact and conclusions of law that the amount and manner of payment of the restitution was reasonable and affordable to Han; and (3) Han's constitutional right to due process was violated as a result of the district court's failure to enter a written judgment on his conviction and sentence.

Based on the foregoing, Han requests that his conviction be reversed and his case dismissed.

#### **I. BACKGROUND**

At the bench trial on June 3, 2003, the district court provided an interpreter for Lim. Lim testified that he was involved in an incident with Han on August 29, 2001 at the Aloha Stadium flea market (the swap meet). At the swap meet, Lim and Han had their businesses in tents that were next to each other with some space in between their tents. Before the incident took place, Lim was on his way to the bathroom when he encountered

Han's wife. Lim testified that Han's wife looked at him "in a very disgusting look and then she started shouting" in Korean, using "lots of cursing words and like 'I'll kill you,' things like that." Lim was fluent in Korean, and he asked Han's wife in Korean why she was saying things like that and then walked away.

After Lim went to the bathroom, he walked back to his tent. Lim testified that when he was almost in front of Han's tent, Han "pop out of his area, and he grab my clothes and then push me, and saying [in Korean] something like, 'I'll kill you. Come over here this way.'" Han grabbed Lim on Lim's right arm and chest area with both of Han's hands. Lim told Han in Korean and English not to touch him, and Han let go of Lim and then pushed Lim. Lim testified that Han responded in Korean, "Do you want to die? Come. Come here with -- come here with me. I will kill you." Han continued to curse at Lim. Lim testified he did not touch Han in any way after Han grabbed and pushed him.

Lim testified that he suffered a scratch, bruise, and pulled back muscle as a result of Han's grabbing and pushing him. Lim had a photograph with him at trial that depicted the bruise. The photograph had been taken at five p.m. on August 29, 2001 after the incident had occurred. The photograph was marked for identification as State's Exhibit 1. Lim testified that the photograph fairly and accurately depicted the injuries he had received during the incident with Han. The State offered the

photograph into evidence. Han's counsel asked permission to voir dire, which the district court granted. Han's counsel asked Lim who took the photograph, and Lim replied that his wife had taken it at about 5:00 in the evening after he was hit. Han's counsel stated she had no objection to the district court's receiving the photograph into evidence, and the photograph was received into evidence as State's Exhibit 1.

The State resumed its direct examination of Lim, at which time Lim testified he did not have the bruise on his chest before Han grabbed and pushed him. Lim also testified that after he went home, his back started aching and he did not sleep well that night. The first thing Lim did the next morning was go to the doctor, where he received physical therapy and acupuncture therapy. His back continued to hurt him continuously for a month. Since the incident, Lim had been unable to lift a lot of heavy stuff, and he continued to have back pain if he sat still for a long time. Lim testified he had not had back pain before the incident.

Lim testified that he believed there was someone else in the area when Han grabbed him; however, when Han grabbed him, he "couldn't think of anything, just blank" and was "just [in] shock . . . didn't see anything . . . couldn't think anything at the time."

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On cross-examination, Lim testified that prior to the August 29, 2001 incident, he had taken Han to Small Claims Court to sue for damage Han had allegedly done to the body and windshield of Lim's car. Lim testified he thought that Han's wife had cursed him the day of the incident

[b]ecause I wrote a letter to the director, manager of the swap meet writing that please, is it possible for you folks remove them to different location because I been here longer than they have, and we have a problem. So that way it would be appreciated if they could be able to help both of them to remove. And we believe that that's the day that we to sign the recontract. That's why I think what took place.

Lim had gone to the manager to request space separate from Han to prevent any further problem. Han's counsel questioned Lim regarding the connection between the lawsuit and the August 29, 2001 incident:

Q. [Han's counsel] Well, isn't it true that you knew exactly why she [Han's wife] was cursing at you, because . . . you had asked to have their stall moved?

A. [Lim] Not instantly. Afterwards, I think that's what happens, but instantly, no, I did not know. While I was in the bathroom thinking that why, then thought about it maybe that's what it is.

Lim testified on cross-examination that Han grabbed his shirt and held on for "for maybe 30 seconds to 1 minute, initial one, grab and then every time he let go and push." Lim testified that Han pushed him twice.

Next, the State called Prince Mohammed Taj (Taj) to the stand. Taj testified that he had a convenience store and also had a stall at Aloha Stadium. Taj knew Han and Lim as his neighbors at the swap meet. Taj was not sure of the exact date,

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but only once in 2001, while he was at his stall, did he see a very heated argument between Han and Lim. The argument lasted for a few minutes, and then security came and separated the two men.

Han testified he was a self-employed vendor at Aloha Stadium on the day of the incident. When his wife returned from the bathroom, she mentioned that she had met Lim in front of the restroom. Han testified that his wife said she had just looked at Lim, and Lim had said to her "Why you -- you looking at me like, you know, glare look?" and "I'm going to poke in your eyes." Han waited for Lim, and a few minutes later, Lim showed up in front of Han's store. Han asked Lim, "So can I have a speak with you?" Han was trying to grab Lim's shoulder or shirt to bring Lim into Han's store or any place nearby because they were in the middle of the street. Han testified that Lim would not allow Han to touch him and Lim insisted he didn't want to talk. This lasted one or two minutes.

Han testified he was trying to get Lim to stay and talk with him because:

I got [a] problem with him before on the case . . . that . . . happen last year January with the windy day. Was . . . one small twist of wind blow my tent, and his truck one small mini van was park behind my stall. And my tent was blow and . . . go fall down and lowly hit his windshield and broke the windshield.

And at that day, we agree to replace the glass. So I replace the glass, and he was unhappy because who install the glass, the all rim of the windshield was rusted. So he said installer told him he cannot give a guarantee against the leaking. And he was upset with that.

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And later on he sue me about he said has a damage on body, and that he wants to replace another windshield.

In the Small Claims Court proceeding, the judge told Han that it was a "mother nature cause" and Han did not have to pay anything.

Han testified that after the case in Small Claims Court, Lim tried to provoke Han all the time. Han testified that on the day of the incident, he was angry about "what [Lim] talk what with my wife," but he was not "that stupid to . . . hitting [Lim] . . . in that situation to make a trouble myself."

On cross-examination, Han testified he learned about the letter Lim had sent to management that day at trial. Han testified he did not grab Lim by the arm and the chest. He was trying to grab Lim's shirt, but he was not able to touch Lim at all. Han testified that maybe he did get angry and swear at Lim during the incident, but he did not tell Lim, "You want to die? Come over here. I'm kill you."

The district court found that

Lim is a more credible witness in that there was . . . a touching of Mr. Lim in an offensive manner, which caused the bruise, . . . which is depicted in the photograph. Therefore, the Court will find the State has proven its case beyond a reasonable doubt. Therefore, the Court will adjudged [sic] the defendant guilty of the offense as charged.

The district court then imposed a sentence of no probation and 30 hours of community service and ordered Han to pay a \$25 CVCSF fee. The district court referred Han to probation for restitution to be determined. A Notice of Entry of Judgment and/or Order was prepared and signed by the district court clerk

on June 3, 2002, but was not file-stamped. On October 17, 2002, Judge Nishimura signed a Restitution Order in the amount of \$1,597.13 (it is unclear from the record before this court whether the Restitution Order was filed in the district court).

After the trial, the following hearings occurred. At a November 13, 2002 proceeding, Han expressed his desire to contest the restitution amount. The district court granted this request, and a restitution hearing was held on January 8, 2003. At that hearing, the district court granted Han's request for a six-week continuance, over the State's objection. The hearing was further continued on February 19, 2003 (at the State's request); April 2, 2003 (by a stipulated continuance); and May 7, 2003 (at Han's request).

At a proceeding on June 12, 2003, the district court noted that a certain amount of restitution had already been made payable to Lim for medical expenses. Although Han initially disputed the cost of Lim's acupuncture treatments and Lim's wage loss, Han agreed with the district court that the only remaining issue would be regarding Lim's wage losses. Lim was not present at the hearing.

At the June 19, 2003 proceeding, the district court reiterated that the sole purpose of the hearing was to determine how much Han should pay in restitution to Lim for wage loss. Han stated he was prepared to furnish evidence that Lim was at the

work site on the days he was supposedly to have been in treatment; however, Han did not have documentary evidence or expert testimony in support of that contention. Han informed the district court that the swap meet was open only on Wednesday, Saturday, and Sunday, and that Lim had regularly worked three days at week at the swap meet. Lim presented a letter from his treating physician stating that after Lim's assault, he had been unable to work for six days during the time period of September 1 to September 15, 2001. Since Lim had already received restitution for one day of lost work, he was asking for five days' worth of restitution at \$400 per day.

Lim testified on direct examination that because of the back pain that resulted from the assault by Han, he could not lift "heavy stuff" and his "chest still hurts once in a awhile." In addition, he needed to use a belt to support his back, which he had not required prior to the assault. Lim testified that for the two weeks following the assault "I was devastated, and . . . my head was not clear, or to think, and . . . because of the pain, my chest and back, I was not able to do anything at all. And I was very shocked and devastated." He could not work for six days during the period of September 1 through September 15, 2001. He went to see two different doctors: an acupuncturist, who did acupuncture, massage, and therapy, and Dr. Seu, who was his treating physician for his chest and back pain.

Lim submitted into evidence a letter from Dr. Seu, who was not available to testify at the hearing. The letter stated that Lim had been unable to work for six days following the assault. Han objected to the letter's entry into evidence based on lack of foundation and authenticity. The district court sustained Han's objection, but allowed Lim to review the letter to refresh his recollection regarding whether he received treatment during the time period.

The district court received into evidence, by stipulation, General Excise Tax returns (tax returns) for the months of August and September 2001. While on the witness stand, Lim compared the two tax returns. Lim testified that the amount of income he earned in September was drastically lower than the amount he earned in August because he could not work for six days in September.

On cross-examination, Lim testified that in September he was unable to do calligraphy and assemble frames, which was work only he, and not his wife, could do. Lim's wife worked at the swap meet on the six days Lim could not work. However, Lim normally did about 80% to 90% of the work, while his wife did about 10% to 20%.

Han testified he was sure Lim was working at the swap meet during the first two weeks of September 2001, and he saw Lim working each and every day. However, Han based this assertion on

his understanding of what Lim usually does, instead of any specific memory regarding each of the dates. Han further testified that Lim's store was open for business during that time, Lim mostly made the mats for inside the frame, and Lim was critical to the running of the business every day.

The district court found that it

agrees that in part that this is a credibility issue, but there is testimony from Mr. Lim that he was in treatment during that period.

. . . [O]n the matter of credibility, if there had been some other neutral witnesses that could have placed Mr. Lim during the time period, and actually saw him working, and or doing calligraphy, then that would have been more on the side of the defendant.

However, the Court will accept Mr. Lim's testimony that he could not produce, or engage in activities that would generate income, such that he did lose a particular amount of income during the period of September.

The Court has looked at the August and September returns which has [sic] been received into evidence by way of stipulation. There is a disparity between August and September. In August, the taxable income was 7,414. For September, it was 3,668. Total amount was 11,082.

The Court accepts the testimony that there's about twelve working days per month for the Swap Meet. Twenty-four days into that amount comes up--comes up to \$461 per day, but the Court will discount it to \$400 a day.

The Court will find that the State has established the amount of restitution by way of Mr. Lim's testimony, and the exhibits that were received into evidence.

The Court will award Mr. Lim the following amount, and an amended restitution order will be generated. The Court will order wage loss, \$400 a day, times five, for \$2,000.

In addition, based upon prior probation reports, the Court will also award Dr. Takushi's medicals of \$142.10 for the x-rays, and prescription of \$14.85.

. . . .

THE COURT: The Court notes that the correct [total] amount should be \$2,156.95.

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A Notice of Entry of Judgment And/Or Order indicating that the restitution was amended to \$2,156.95 was prepared, but not filed, after the June 19, 2003 hearing. A proof of compliance hearing was set for October 15, 2003.

Han filed an Ex Parte Motion to Extend Time to File Notice of Appeal on July 22, 2003; this motion was denied by Judge Nagata as untimely. On July 31, 2003, Han filed a Motion to Extend Time to File Notice of Appeal, which was set for hearing on August 11, 2003. At the August 11 hearing, Judge Woo granted Han an extension of time of thirty days within which to file his notice of appeal. Han filed his notice of appeal on August 18, 2003.

On October 14, 2003, the Hawai'i Supreme Court filed an Order for Temporary Remand, which stated in relevant part:

[I]t appears that in [Han's district court case], the presiding judge did not enter a written judgment on Defendant-Appellant Chung Han's conviction and sentence for harassment, HRS § 711-1106(1)(a) (1993). "Appeals from the district court, in criminal cases, are authorized by HRS § 641-12 [1993], which . . . provides in pertinent part that appeals upon the record shall be allowed from all final decisions and final judgments of district courts in all criminal matters." State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996) (internal quotation marks and brackets omitted.) With respect to the final judgment requirement, the district court clerk's notation of Appellant Han's conviction and sentence on the district court's calendar constituted entry of judgment pursuant to Rule 32(c)(2) of the Hawai'i Rules of Penal Procedure for the purpose of executing Appellant Han's sentence. However, for the purpose of an appeal, Rule 4(b)(3) of the Hawai'i Rules of Appellate Procedure [HRAP] provides that "[a] judgment or order is entered within the meaning of this subsection when it is filed with the clerk of the court." (Emphasis added.) "[I]n order to appeal a criminal matter in the district court, the appealing party must appeal from a written judgment or order that has been filed with the clerk of the court pursuant to HRAP Rule 4(b)(3)." State v.

Bohannon, 102 Hawai'i 228, 236, 74 P.3d 980, 988 (2003). Therefore, the district court must enter a written judgment on Appellant Han's conviction and sentence so that Appellant Han can proceed with this appeal pursuant to HRS § 641-12 (1993).

(Emphasis in original; some bracketed material in original and some added). On October 16, 2003, the district court filed a Notice of Entry of Judgment And/Or Order setting forth the amount of amended restitution. On that same date, the district court filed a Notice of Entry of Judgment and/or Order staying the sentence pending appeal.

## II. STANDARDS OF REVIEW

### A. Ineffective Assistance of Counsel

The proper standard for claims of ineffective assistance of counsel on appeal is whether, "viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks, citation, and brackets omitted).

General claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry. Specific actions or omissions alleged to be error but which had an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny. If, however, the action or omission had no obvious basis for benefitting the defendant's case and it "resulted in the withdrawal or substantial impairment of a potentially meritorious defense," then it will be evaluated as information that an ordinarily competent criminal attorney should have had.

Id. (ellipses and brackets omitted; emphasis in original)

(quoting Briones v. State, 74 Haw. 442, 462-63, 848 P.2d 966, 976 (1993)). "[M]atters presumably within the judgment of counsel,

like *trial strategy*, will rarely be second-guessed by judicial hindsight." State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998) (internal quotation marks and citation omitted; emphasis in original).

**B. Constitutional Questions**

"We answer questions of constitutional law by exercising our own independent judgment based on the facts of the case, and thus, questions of constitutional law are reviewed on appeal under the right/wrong standard." State v. Rivera, 106 Hawai'i 146, 155, 102 P.3d 1044, 1053 (2004) (internal quotation marks and citation omitted) (quoting State v. Kaua, 102 Hawai'i 1, 7, 72 P.3d 473, 479 (2003)).

**III. DISCUSSION**

**A. Ineffective assistance of counsel.**

Han contends he received ineffective assistance of counsel as a result of his attorney's failure to object to the entry into evidence of the photograph depicting Lim's injuries and failure to call percipient witnesses or provide expert testimony in rebuttal during the restitution hearing. However, there is nothing in the record explaining why Han's attorney did not do those things. Hence, there is no way of knowing, based on the record, whether the specific "omissions alleged to be error" by Han actually "had an obvious tactical basis for *benefitting* the defendant's case." Dan, 76 Hawai'i at 427, 879 P.2d at 532.

Regardless, "matters presumably within the judgment of counsel, like *trial strategy*, will rarely be second-guessed by judicial hindsight." Richie, 88 Hawai'i at 39-40, 960 P.2d 1247-48. In accordance with this standard, this court should not second-guess Han's attorney's decision not to do what Han claims his attorney failed to do.

**B. District court's failure to enter findings of fact and conclusions of law that amount and manner of payment of restitution was reasonable and affordable.**

Han argues that "[r]estitution must be in an amount the defendant can afford to pay." He adds that "[w]hen restitution is imposed the trial court must enter into the record findings of fact and conclusions that the manner of payment and amount of restitution is reasonable and one which the defendant can afford." However, in the instant case, as Han argues, the district court did not do so.

Hawaii Revised Statutes § 706-605(1)(d) (Supp. 2004) states in relevant part:

**§706-605 Authorized disposition of convicted defendants.**  
(1) Except as provided in parts II and IV of this chapter or in section 706-647 and subsections (2) and (6) of this section and subject to the applicable provisions of this Code, the court may sentence a convicted defendant to one or more of the following dispositions:

. . . .

(d) To make restitution in an amount the defendant can afford to pay[.]

In State v. Werner, 93 Hawai'i 290, 1 P.3d at 760 (App. 2000), Werner, pursuant to a plea agreement, pled guilty in two

separate criminal cases to one count of Burglary in the Second Degree. Id. at 290-91, 1 P.3d 760-61. One term of the plea agreement was that Werner agree to pay restitution as determined by the Adult Probation Division or the court in both cases. Id. at 291, 1 P.3d at 761.

The circuit court found Werner guilty of Burglary in the Second Degree in both cases and, as part of his sentence, ordered him to pay restitution. Id. The Adult Probation Division determined that Werner should pay the aggregate amount of \$24,297.65 as restitution. Id. Werner objected to the restitution amount in a letter to the probation officer:

Mr. Werner is unable to pay due to his indigent financial status. According to Sec. 706-605(1)(d) HRS, restitution must be in an amount the defendant can afford to pay. *State v. Murray*, 63 Haw. 12, 621 P.2d 334 (1980). Being incarcerated, Mr. Werner does not have the ability to pay \$24,297.65.

Id. At the hearing on Werner's objection to the restitution amount, the court opined that

it's true he doesn't have a job because he was a burglar and a very good one at that.

And I already noted during sentencing the nature of the crimes showed a high degree of intelligence, sophistication and ingenuity, all of which will serve Mr. Werner well once he gets out of prison, which may not be for a while probably, given [the] current situation of the paroling authority, [it] may be for five years minimum.

He will get out some day, and he's young, smart, resourceful, and he can make a substantial income, even given his debts.

Id. at 292, 1 P.3d at 762. The circuit court then entered an Amended Judgment, setting forth the amount of restitution as \$20,000. Id.

Werner appealed the circuit court's decision regarding the restitution amounts. Id. After reviewing Werner's appeal, the Hawai'i Supreme Court filed a Memorandum Opinion, vacating the sentences and remanding the cases:

[W]e are convinced that the question whether \$20,000.00 is an amount Werner *can afford to pay* is an inquiry that necessarily includes, at a minimum, an analysis of factors showing that Werner presently can afford to pay or will be able in the future to afford to pay \$20,000.00. In conducting such an analysis, the court would look to, for example, any assets that Werner owns as well as his past earning capacity and his potential in the future as a wage earner, based on legitimate previous experience, training, and education.

. . . [The circuit court] was . . . required, in accordance with *Gaylord*,<sup>3/</sup> to enter findings and conclusions specifically illustrating that Werner could afford to pay \$20,000.00 in restitution.

. . . .

Inasmuch as the restitution order against Werner was illegally imposed, we vacate Werner's amended sentences and remand for resentencing consistent with this opinion.

Id. at 293, 1 P.3d at 763 (emphasis in original; footnote added).

The State filed a Motion for Resentencing, and Werner filed a Motion for Correction of Sentence. Id. After the hearing on both motions, the circuit court entered Findings of

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<sup>3/</sup> The Hawai'i Supreme Court held in *State v. Gaylord*, 78 Hawai'i 127, 890 P.2d 1167 (1995), that "HRS § 706-605(1)(d) limits restitution orders to 'an amount the defendant can afford to pay.'" 78 Hawai'i at 152, 890 P.2d at 1192 (internal quotation marks and citations omitted). Accordingly, "it is incumbent upon the sentencing court to enter into the record findings of fact and conclusions that the manner of payment is reasonable and one which the defendant can afford." Id. at 153, 890 P.2d at 1193 (internal quotation marks, citation, footnote, and brackets omitted).

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Fact, Conclusions of Law, and Order Denying Motion for Correction of Sentence, stating in relevant part:

*FINDINGS OF FACT*

1. Werner is young, healthy, reasonably intelligent and capable of working upon release from prison.
2. Werner is working in prison and is presently making 38 cents a day.
3. Werner has a prior history of employment including Ono Construction as a mason tender, Hawaii Roofing as a roofer, and Island Roofing as a truck driver and journeyman.
4. Werner has the support of his family.  
    . . . .
7. Werner has the ability to pay restitution in the amount of \$17,200 . . . and \$2,800 . . . and has agreed to do so.  
    . . . .

*CONCLUSIONS OF LAW*

- . . . .
2. The manner of payment is reasonable and one which Werner can afford.
3. The amount of restitution is one that Werner can afford to pay.

Id. at 293-94, 1 P.3d at 763-64 (citations, brackets, and footnotes omitted). Werner filed a Motion for Reconsideration of Findings of Fact, Conclusions of Law and Order Denying Motion for Correction of Sentence, which the circuit court denied. Id. at 294, 1 P.3d at 764.

The circuit court entered an Order of Restitution, which stated in relevant part that "[t]he Court reviewed Werner's income, expense, asset, and liability statement in the Pre-Sentence Diagnosis and Report and found that Werner will have the ability to make restitution payments in full." Id. (brackets omitted). The court continued in a footnote: "The circuit court

did not enter its preliminary findings leading to its ultimate finding that Werner will have the ability to make restitution payments in full." Id. at 294 n.3, 1 P.3d at 764 n.3.

Werner appealed the circuit court's "Findings of Fact, Conclusions of Law, and Order Denying Motion for Correction of Sentence," and "Order Denying Motion for Reconsideration of Findings of Fact, Conclusions of Law and Order Denying Motion for Correction of Sentence." Id. at 290, 1 P.3d at 760. This court vacated and remanded based on the fact that the circuit court

did not comply with the Hawai'i Supreme Court's instruction that the circuit court "was nevertheless required, in accordance with *Gaylord*, to enter findings and conclusions specifically illustrating that Werner could afford to pay \$20,000.00 in restitution." This instruction requires the circuit court to determine the relevant time period and Werner's gross income and necessary expenses during that time period.

Id. at 297, 1 P.3d at 767.

In the instant case, the district court did not "enter findings and conclusions specifically illustrating" that Han could afford to pay \$2,000.00 in restitution to Lim for wage loss. Therefore, the district court's restitution order must be vacated.

**C. The district court's failure to enter written judgment on Han's conviction and sentence.**

Han argues in his last point of error that due to the district court's failure to enter a written judgment he has effectively been deprived of his right to an appeal, which is a violation of his procedural due process rights. He states that

after he initially filed his appeal of the district court's judgment, the Hawai'i Supreme Court

refused jurisdiction on the ground that no written judgment had been entered. The case was remanded to the district court with an order that the district court judge enter a written judgment on Mr. Han's conviction and sentence within 30 days of the remand. Notwithstanding [the Hawai'i Supreme Court's] order the district court has never entered a written judgment.

"[T]o appeal a criminal matter in the district court, the appealing party must appeal from a written judgment or order that has been filed with the clerk of the court pursuant to HRAP [Hawai'i Rules of Appellate Procedure] Rule 4(b)(3)." State v. Bohannon, 102 Hawai'i 228, 236, 74 P.3d 980, 988 (2003) (emphasis in original). Hawai'i Rules of Appellate Procedure Rule 4(b)(3) reads in relevant part:

**Rule 4. APPEALS--WHEN TAKEN.**

. . . . .

**(b) Appeals in criminal cases.**

. . . . .

(3) ENTRY OF JUDGMENT OR ORDER DEFINED. A judgment or order is entered within the meaning of this subsection when it is filed with the clerk of the court.

Furthermore, Hawai'i Rules of Penal Procedure (HRPP) Rule 32(c)(2) (2003) states in relevant part:

**Rule 32. SENTENCE AND JUDGMENT.**

. . . . .

**(c) Judgments.**

. . . . .

(2) IN THE DISTRICT COURT. A judgment of conviction in the district court shall set forth the disposition of the proceedings and the same shall be entered on the record of the court. The notation of the judgment by the clerk on the calendar constitutes the entry of the judgment.

On June 3, 2002, the district court prepared but did not file-stamp a written judgment or order setting forth Han's conviction and sentence. However, two days after the Hawai'i Supreme Court filed its Order for Temporary Remand, remanding the case to the district court and ordering the court to issue a written judgment on Han's conviction and sentence within 30 days after entry of the order, the district court filed on October 16, 2003 the Notice of Entry of Judgment and/or Order (Notice) from which Han appealed. There is nothing in the record before this court to indicate that Han objected to the Notice.

Han adds that due to the court's failure to enter a written judgment, he has been subjected to an unreasonable delay in the hearing of his appeal and prosecution of his case, which is presumptively prejudicial. The Order for Temporary Remand was filed on October 14, 2003 and the Notice was filed two days later on October 16, 2003. Han's contention is without merit. Han does not cite any relevant case law or make a discernible argument with respect to this contention.

#### **IV. CONCLUSION**

We vacate the judgment filed October 16, 2003 in the District Court of the First Circuit, Ewa Division, as to the amended restitution, affirm the remainder of the judgment without prejudice to Han's filing a HRP Rule 40 petition on his

ineffectiveness of counsel claim, and remand this case for further proceedings consistent with this opinion.

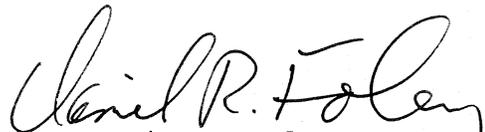
DATED: Honolulu, Hawai'i, January 17, 2006.

On the briefs:

Michael J. Park and  
Jacob M. Merrill  
for Defendant-Appellant.

Ryan Yeh,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

  
Acting Chief Judge

  
Associate Judge

  
Associate Judge