

NO. 27567

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN RE:

HENRY KEOUA McKEAGUE, Petitioner-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P. NO. 05-1-0357)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,
Acoba, and Duffy, JJ.)

Petitioner-Appellant Henry Keoua McKeague

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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("Petitioner") appeals from the September 23, 2005 order of the Circuit Court of the First Circuit ("the court"),¹ denying Petitioner's motion to permit filing of new litigation as is required of vexatious litigants by Hawai'i Revised Statutes ("HRS") § 634J-7 (1993).² The order is affirmed.

¹ The Honorable Victoria S. Marks presided.

² Hawai'i Revised Statutes ("HRS") § 634J-7 states in relevant part as follows:

(a) In addition to any other relief provided in this chapter, the court, on its own motion or the motion of any party, may enter a pre-filing order which prohibits a vexatious litigant from filing any new litigation in the courts of this State on the litigant's own behalf without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of this order by a vexatious litigant may be punished as a contempt of court.

(b) The presiding judge shall permit the filing of litigation only if it appears, after hearing, that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in section 634J-4.

(c) The clerk shall not file any litigation presented

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On appeal, Petitioner states seven objections in his "Notice of Appeal by Affidavit," stating that (1) it is "unjust" for the court to take on the role of appellee or defendant, (2) Petitioner is no longer a vexatious litigant because the "statute of limitations" has run, (3) "the court was highly prejudicial, showing bias and an opinion or judgment formed beforehand or without due examination," (4) the court's comment "renders her unable to exercise her function impartially in this case," (5) the court incorrectly assumed the role of respondent, as the case pertains only to certain proposed defendants ("Proposed Defendants"), (6) the court erred in stating the "proposed litigation had no merit," and (7) the proposed complaint should not have been denied "as it contained no harassment or delay elements and that it had merit." Petitioner further contends in his conclusion that he was denied his "Rights of Due Process."

The State of Hawai'i, as nominal respondent ("Respondent"), answers and summarizes Petitioner's objections as a general challenge to the court's decision, and asserts that because Petitioner does not comply with Hawai'i Rules of

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by a vexatious litigant subject to a pre-filing order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. . . .

(Emphasis added.)

Appellate Procedure ("HRAP") Rule 28(b),³ Petitioner's appeal should be dismissed according to HRAP Rule 30.⁴

HRAP Rule 30 states that "[w]hen the brief of an appellant is otherwise not in conformity with these rules, the appeal may be dismissed or the brief stricken and monetary or other sanctions may be levied by the appellate court." (Emphases

³ The relevant portion of Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28(b) states as follows:

(b) Opening Brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

(1) A subject index of the matter in the brief with page references and a table of authorities listing the cases, alphabetically arranged, text books, articles, statutes, treatises, regulations, and rules cited, with references to the pages in the brief where they are cited. Citation to Hawai'i cases since statehood shall include both the state and regional reporters.

. . . .
(3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings. In presenting those material facts, all supporting and contradictory evidence shall be presented in summary fashion, with appropriate record references. . . .

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. . . .

⁴ The relevant portion of HRAP Rule 30 states as follows:

When the brief for appellant is not filed within the time required, the appellate clerk shall forthwith give notice to counsel for the parties that the matter will be called to the attention of the appellate court on a day certain for such action as the appellate court deems proper and that the appeal may be dismissed. When the brief of an appellant is otherwise not in conformity with these rules, the appeal may be dismissed or the brief stricken and monetary or other sanctions may be levied by the appellate court. . . .

(Emphases added.)

added.) In light of the discretion granted by HRAP Rule 30, this court does not dismiss Petitioner's appeal in light of his pro se status. See Morgan v. Planning Dep't, County of Kauai, 104 Hawai'i 173, 180-81, 86 P.3d 982, 989-90 (2004) (observing that non-compliance with HRAP Rule 28(b)(4) "offers sufficient grounds for the dismissal of the appeal" but recognizing that this court "has consistently adhered to the policy of affording litigants the opportunity 'to have their cases heard on the merits, where possible'" (quoting O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 386, 885 P.2d 361, 364 (1994))).

As to objections (1), (3), and (4), Petitioner's challenges to the impartiality of the court, Petitioner fails to show a clear and precise demonstration of prejudice. According to HRS § 601-7 (1993 & Supp. 2005), a party that claims judicial bias must demonstrate in an affidavit that there are facts and reasons for the belief that as to that judge, bias or prejudice exists.⁵ No affidavit was filed. Moreover, Petitioner must

⁵ The relevant portion of HRS § 601-7 (1993) states as follows:

(b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge

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clearly show unfairness. See State v. Birano, 109 Hawai'i 314, 323, 126 P.3d 357, 366 (2006) (stating that "reversal on the grounds of judicial bias or misconduct is warranted only upon a showing that the trial was unfair[]" and that "[u]nfairness, in turn, requires a clear and precise demonstration of prejudice[]" (citing State v. Hague, 103 Hawai'i 38, 48, 79 P.3d 131, 141 (2003))). The only "demonstration" Petitioner offers of judicial bias is the alleged statement of the court, "Mr. McKeague you've had a similar case like this before haven't you?" This statement alone is not "a clear and precise demonstration of prejudice," and Petitioner offers no reason to believe that this statement is evidence of prejudice.

As to objection (2) regarding the statute of limitations, there is no discernable argument; therefore, we do not consider it. See State v. Bui, 104 Hawai'i 462, 464, 92 P.3d 471, 473 (2004) ("Inasmuch as Defendant 'presents no discernable argument in support of this contention[,] . . . it is our prerogative to disregard this claim'" (quoting State v. Moore, 82 Hawai'i 202, 206, 921 P.2d 122, 126 (1996))). Petitioner does not cite to any statute or other authority for this claim.

As to objections (5), (6), and (7), Petitioner apparently contends that the court erred in denying his motion to file litigation because his case has merit. Other than the

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deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.

(Emphasis added.)

assertion by Petitioner that his case has merit, Petitioner offers no evidence to support his proposed complaint. Petitioner claims compensatory damages of \$105,000 and punitive damages of at least \$1 million, but he offers no coherent argument as to why or how Proposed Defendants are liable for the damage amounts. Petitioner has not established the "strong showing," Lepere v. United Pub. Workers, Local 646, 77 Hawai'i 471, 474 n.5, 887 P.2d 1029, 1032 n.5 (1995), required for this court to vacate the court's decision to deny him permission to file litigation.

Petitioner further contends that denying his motion to file litigation denies him his due process rights.⁶ See Ek v. Boggs, 102 Hawai'i 289, 298, 75 P.3d 1180, 1189 (2003) (stating, in case applying HRS § 634J-7(a)⁷ that, "[a]t its core, procedural due process of law requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant liberty interest" (citing Price v. Zoning Bd. of Appeals of the City & County of Honolulu, 77 Hawai'i 168, 172, 883 P.2d 629, 633 (1994))). A prefiling order does not violate due process rights

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The Fourteenth amendment to the United States Constitution and article I, section 5 of the Hawai'i Constitution provide in relevant part that no person shall be deprived of "life, liberty, or property without due process of law." Substantive due process has been defined as that which protects those fundamental rights and liberties which are implicit in the concept of ordered liberty.

Ek v. Boggs, 102 Hawai'i 289, 297, 75 P.3d 1180, 1188 (internal citations and quotation marks omitted).

⁷ See supra note 2.

because it does not deny the vexatious litigant access to the courts, but operates solely to preclude the initiation of meritless lawsuits and their attendant expenditures of time and costs. Id. (citing Bravo v. Ismaj, 120 Cal. Rptr. 2d 879, 887 (Cal. Ct. App. 2002)).

Because Petitioner has had a hearing on his motion to permit filing of litigation, he has had the opportunity to be heard. Thus in this case where the proposed complaint was found to be without merit and Petitioner has not demonstrated the court abused its discretion in so finding, Petitioner's due process rights have not been violated. Therefore,

In accordance with HRAP Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the first circuit court's order filed on September 23, 2005, from which the appeal is taken, is affirmed.

DATED: Honolulu, Hawai'i, July 11, 2006.

On the briefs:
Henry Keoua McKeague,
petitioner-appellant,
pro se, on the motion.

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