

DISSENT BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

I respectfully dissent and would grant the application for writ of certiorari filed by Petitioners/Defendants-Appellants Steven Schaefer (Steven) and April Esther Schaefer, also known as April Ester Paiva (April) [collectively, Petitioners] from the judgments of the Intermediate Court of Appeals (the ICA)¹ filed on May 15, 2008, pursuant to its April 30, 2008 published opinion vacating the October 1, 2004 judgments of the district court of the fifth circuit² (the court) and remanding for resentencing before a different judge. State v. Schaefer, 117 Hawai'i 490, 501-02, 184 P.3d 804, 816-17 (App. 2008).

The following essential matters, some verbatim, are from the record and the submissions of the parties.³

On March 18, 2004, [Respondent/Plaintiff-Appellee State of Hawai'i (Respondent)] filed identical Complaints against both [Steven] and his wife, [April], charging each of them with 21 misdemeanor charges

On March 19, 2004, pursuant to a plea agreement, [Petitioners] entered pleas of No-Contest

On October 1, 2004, . . . [the court] filed the Judgment, which sentenced [Petitioners] to, among other conditions, one year incarceration on each count

(Emphases added.)

At the sentencing hearing on October 1, 2004, [Petitioners] raised several procedural motions, two of which are at issue in this petition. One, [Petitioners] orally moved [the court] to dismiss the complaints against them due to alleged prosecutorial misconduct. [Petitioners] claimed that the Deputy Prosecuting Attorney (DPA) handling the case violated Rule 3.6(a) of the Hawai'i Rules of

¹ The published opinion was authored by Presiding Judge Corinne K.A. Watanabe and joined by Associate Judges Craig H. Nakamura and Alexa D.M. Fujise.

² The Honorable Trudy K. Senda presided.

³ Steven did not file a reply brief.

Professional Conduct (HRPC), by providing extrajudicial statements that appeared in a front-page article of "The Garden Island" newspaper on August 24, 2004. As noted by the ICA, the "article in The Garden Island was headlined *Kupuna swindled by sovereign fakes* and included a subheadline entitled *Attorney: Nearly 20 Kawaiians lost money and property to trusted pair*. The DPA was quoted in several paragraphs in the article.'" [(Quoting Schaefer, 117 Hawai'i at 495 n.5, 184 P.3d at 810 n.5).] [The court] acknowledged seeing the article, but professed only to having "glanced through it [not] really digest[ing] it very carefully." [The court] denied the motion to dismiss the charges against [Petitioners].

Two, [Petitioners] orally moved for a change of venue of the sentencing hearing to another district court outside Kaua'i based on the DPA's alleged misconduct [The court] denied the oral motion

(Italics and some brackets in original.) (Emphases added.)

(Footnote omitted.)

On appeal Petitioners raised five issues.

[Petitioners] allege that [the court]:

(1) Violated their procedural due-process rights under Hawai'i Revised Statutes (HRS) § 706-604 (1993)⁴ by denying their oral motion for preparation of a full [presentence investigation report (PSI)];

(2) Violated their procedural due-process rights under HRS § 706-604 by denying their oral motion to strike inaccurate, unsubstantiated, and derogatory information from the Partial PSIs;

(3) Erroneously denied their oral motion to dismiss the charges against them due to prosecutorial misconduct surrounding pre-sentence publicity;

(4) Improperly denied their oral motion to change the venue of their sentencing hearing to a location where pre-sentence publicity did not exist; and

⁴ HRS § 706-604 provided, in relevant part, as follows:

Opportunity to be heard with respect to sentence; notice of pre-sentence report; opportunity to controvert or supplement; transmission of report to department.

(1) Before imposing sentence, the court shall afford a fair opportunity to the defendant to be heard on the issue of the defendant's disposition.

(2) The court shall furnish to the defendant or the defendant's counsel and to the prosecuting attorney a copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination and afford fair opportunity, if the defendant or the prosecuting attorney so requests, to controvert or supplement them.

(Boldfaced font in original.)

(5) Erroneously failed to directly obtain from them a knowing, voluntary, and intelligent waiver of their constitutional right to pre-sentence allocution.

Schaefer, 117 Hawai'i at 496, 184 P.3d at 811 (emphases added).

The ICA said as to the first issue, "[the court] denied [Petitioners'] requests for a 'full PSI' without determining the scope of the parties' plea agreements and whether the Partial PSIs were a material breach of the plea agreements. On remand, [the court] shall make this determination." Id. at 501, 184 P.3d at 816. The ICA held the second issue raised was without merit. Id. The ICA held as to the fifth issue that "[w]e need not reach the waiver issue, however, because we conclude that [the court] plainly erred when it failed to personally address [Petitioners] regarding their right to pre-sentence allocution," id. at 496, 184 P.3d at 811, and "remand[ed] the[] cases for resentencing before a different judge[,] "id. at 498, 184 P.3d at 813.⁵

However, the ICA held with respect to Petitioners' third and fourth issue, that "[i]n light of our remand it is unnecessary for us to address [Petitioners'] third and fourth points of error regarding prosecutorial misconduct and trial publicity." Id. Petitioners do not challenge the ICA's holdings on the first, second, and fifth issues, but maintain that if the ICA "had reversed the issue . . . with respect to prosecutorial

⁵ Respondent conceded the case should be remanded for sentencing before a new judge for this violation, but did not agree that venue should be changed.

misconduct . . . it could have mandat[ed] a dismissal of these cases with prejudice."

As Petitioners maintain, I believe it was grave error of law for the ICA not to answer the third and fourth issues raised in the appeal. Respectfully, the ICA's determination that the court must determine whether the "partial PSIs" breached the plea agreement (the first issue) and that the right to allocution had been violated (the fifth issue) and the resulting remand therefor did not resolve the question of whether there was prosecutorial misconduct and, if so, whether such conduct should result in dismissal of the cases or, in the alternative, in a change of venue to another island.

Dismissal obviously would forever terminate the cases and would not result in a new sentencing hearing. A change in venue, as requested, would not result in the case being sent back to Kaua'i, as the ICA had ordered. Hence, contrary to the ICA's statement and Respondent's position, "remand" to the court for further determination as to whether the plea agreement had been breached and whether Petitioners' right to allocution had been violated did not render the issues of dismissal or change of venue moot and, thus, "unnecessary [for the ICA] to address."⁶

⁶ If on appeal it was determined by the ICA that the court erred in denying dismissal, the case would end and the questions raised in issues one and five would be moot and there would be no reason to remand. Similarly, if a change of venue were required, the case would not be remanded to the fifth circuit. If the court's denial of dismissal were sustained by the ICA, then the matters in issues one and five could be remanded, as the ICA held. But remand of issues one and five would not be reached logically until the overarching issues of dismissal or change of venue were first decided.

Accordingly, certiorari must be accepted because the ICA failed to answer points of error presented to it that sounded as grounds for vacation of the trial court's sentence independent of the first and fifth points of error. See Robbins v. State, 114 S.W.3d 217, 222 (Ark. 2003) (granting certiorari because, in previous appellate proceedings, "an issue was allegedly overlooked which would have been reversible error"); Metro. Dade County v. Dusseau, 826 So.2d 442, 444 (Fla. Dist. Ct. App. 2002) (granting certiorari because, upon remand, the appellate division of the trial court had not followed the District Court of Appeals' instruction to consider a particular issue); Ashton v. Brown, 660 A.2d 447, 455 (Md. 1995) (granting certiorari and considering an issue not addressed by the intermediate appellate court "although the matter was raised in the briefs submitted" to that court).

However, it is appropriate under these circumstances to resolve issues three and four raised in the petition without remanding the case to the court. The dismissal and/or change of venue questions were raised before and ruled on by the court, were fully briefed before the ICA, do not require further receipt of evidence, did not involve disputed facts as to events, and are resolvable on certiorari. Cf. State v. Gonsales, 91 Hawai'i 446, 448, 984 P.2d 1272, 1274 (App. 1999) (per curiam) (stating that in accordance with HRCF Rule 52(a), governing findings by a

court, while a court "may vacate a judgment and remand the case for further findings if the findings are not sufficiently definite for a clear understanding of the basis of the decision[,] " it should be noted that "reversal and remand are unnecessary if the decision contains an adequate discussion of the major factual issues, which leaves no doubt as to the facts upon which the trial court based its decision" (quoting Lima v. Tomasa, 42 Haw. 478, 480 (1958)).⁷

As to the third issue that was raised on appeal, Petitioner Steven maintains that

[i]f the court does find prosecutorial misconduct, the issue then becomes whether the alleged misconduct reaches the level of reversible error beyond a reasonable doubt. The factors to be considered are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant.

(Citing State v. Maluia, 107 Hawai'i 20, 24, 108 P.3d 974, 978 (2005.))

⁷ See also Richards v. Kailua Auto Mach. Serv., 10 Haw. App. 613, 621, 880 P.2d 1233, 1238 (1994) (explaining that "findings of fact by the circuit court are not jurisdictional and the appellate court may proceed where the record is clear and findings are unnecessary"); Lizzi v. Washington Metro. Area Transit Auth., 862 A.2d 1017, 1021-22 (Md. 2004) (determining that, in the interest of judicial economy, it would decide an issue "raised in and . . . fully determined by the trial court" but not addressed by the intermediate appellate court); Hough v. Leonard, 867 P.2d 438, 446 (Okla. 1993) (under Oklahoma appellate rules, if the intermediate appellate court "did not decide all of the properly preserved and briefed issues," the supreme court is authorized to "address such undecided matters or . . . remand the cause" for decision by the intermediate appellate court (citation omitted)); Clark County Pub. Util. Dist. No. 1 v. Wilkinson, 991 P.2d 1161, 1167 n.10 (Wash. 2000) (according to Washington's Rules of Appellate Procedure, when considering a decision of the intermediate appellate court "that did not consider all of the issues raised which might support that decision," the supreme court can "either consider and decide those issues or remand the case" to the intermediate appellate court (citation and internal quotation marks omitted)).

Concerning the nature of the alleged improper conduct, Petitioners state the prosecutor "violated" HRPC Rule 3.6.⁴ In regard to whether the conduct was harmful under the reasonable doubt standard, Petitioner Steven maintains that (1) "[t]he nature of the conduct consisted of providing information and extra-judicial statements to the *Garden Isle* newspaper . . . well beyond what is permissible under Rule 3.6(a), HRPC"; (2) "the issue of a curative instruction is irrelevant . . . [because the

⁴ HRPC Rule 3.6 provides in relevant part as follows:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(Emphases added.)

court] admitted to 'glancing' at the article"; and (3) [the court] had to have been left with the impression that the community was counting on it to dole out the maximum punishment[.]” However, assuming, arguendo, misconduct on the part of the DPA, the effect of the alleged misconduct was harmless beyond a reasonable doubt for the reasons that follow.

With respect to the nature of the alleged misconduct, nothing indicates there was any court order prohibiting the DPA from speaking to the media. Although Steven contends that “[t]he DPA’s quoted statements buttressed the article’s inflammatory innuendos, and . . . incited an overall hostility towards the defendants[,]” Petitioners do not point to any specific falsehoods in the quotes from the DPA. Second, inasmuch as this was not a jury trial, a curative instruction would not be a relevant consideration. Third, with respect to strength or weakness of the evidence, Petitioners pleaded no contest, so the evidence against them is not disputed.

However, Petitioners are entitled to a fair and impartial judge. State v. Silva, 78 Hawai‘i 115, 118, 121, 890 P.2d 702, 705, 708 (App. 1995) (in a jury-waived trial, when the court assumes the role of a prosecutor by conducting an examination of a witness to confirm elements of the crime, and persuades a defendant not to testify, the court “violates the fundamental due process requirement that the tribunal be

impartial"), overruled on other grounds by Tachibana v. State, 79 Hawai'i 226, 235-36, 900 P.2d 1293, 1302-03 (1995).⁵

Several considerations are pertinent. First, Petitioners did not bring a motion to disqualify the court as personally biased or prejudiced against Petitioners. HRS § 601-7⁶ provides statutory guidance in testing for the disqualification of judges. In State v. Pokini, 55 Haw. 80, 80,

⁵ Steven argues "the article . . . leads to one significant and irrefutable impression: one, the trial court had to have been left with the impression that the community was counting on it to dole out the maximum punishment possible. In fact, that is exactly what the trial court did[.]"

⁶ HRS § 601-7 states in relevant part:

- which:
- (a) No person shall sit as a judge in any case in
 - (1) The judge's relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, a more than de minimis pecuniary interest; or
 - (2) The judge has been of counsel or on an appeal from any decision or judgment rendered by the judge;

provided that no interests held by mutual or common funds, the investment of disinvestment of which are not subject to the direction of the judge, shall be considered pecuniary interests for purposes of this section; and after full disclosure on the record, parties may waive disqualification due to any pecuniary interest.

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

515 P.2d 1250, 1251 (1973), this court directed that "[t]he affidavit required by the provisions of HRS § 601-7(b) on a motion for disqualification of the trial judge must state, directly or in substance, a personal bias or prejudice on the part of the judge as against the defendant." No affidavits were filed in this case.

Second, "[i]f the alleged bias falls outside of the provisions of HRS § 601-7, the court may then turn . . . [to] the broader inquiry of whether 'circumstances . . . fairly give rise to an appearance of impropriety and . . . reasonably cast suspicion on [the judge's] impartiality.'" State v. Ross, 89 Hawai'i 371, 377, 974 P.2d 11, 17 (1999) (quoting State v. Brown, 70 Haw. 459, 467 n.3, 776 P.2d 1182 1188 n.3 (1989) (ellipses in original)). Nothing in the record indicates that reasonable suspicion was cast on the judge's impartiality by the article.

This court stated in State v. Antone, 62 Haw. 346, 353, 615 P.2d 101, 107 (1980), that "[i]t is well established that a judge is presumed not to be influenced by incompetent evidence." (Citation omitted.) In Antone, the appellant argued, in a jury-waived trial, that his counsel's failure to object to hearsay testimony from four witnesses seriously prejudiced his defense. Id. at 354, 615 P.2d at 107. This court determined that there is a presumption that "the presiding judge [would] have disregarded the incompetent evidence and relied upon that which was competent[,]" id. at 355, 615 P.2d at 108, and therefore,

"counsel's omissions with respect to the hearsay testimony did not substantially impair the appellant's . . . defense[,] "id."⁷

The sentencing hearing was akin to a bench trial in that the court determined the facts and the law. In this regard, it may be presumed similarly that the judge would disregard incompetent matters emanating from media coverage that surrounded the sentencing hearing. Additionally, the court on the record⁸ repudiated any claim of alleged influence wrought by the article.⁹

⁷ See also State v. Lioen, 106 Hawai'i 123, 133, 102 P.3d 367, 377 (App. 2004) (stating that on appeal of "a bench trial, [the ICA] presume[s] that the judge was not influenced by incompetent evidence" (citing Antone, 62 Haw. at 353, 615 P.2d at 107)); State v. Montgomery, 103 Hawai'i 373, 383, 82 P.3d 818, 828 (App. 2003) (stating that the allegations of sexual assault made by the complaining witness "may not have been admissible for its substance" but "admissible to rehabilitate the [complaining witness's] credibility . . . because in a bench trial[,] . . . 'there is a presumption that any incompetent evidence [is] disregarded'" (quoting Gutierrez, 1 Haw. App. at 270, 618 P.2d at 317)); State v. Gutierrez, 1 Haw. App. 268, 269, 270, 618 P.2d 315, 316, 317 (1980); (stating that because in a "jury-waived [trial] . . . the normal rule is that if there is sufficient competent evidence to support the judgment or finding below, there is a presumption that any incompetent evidence [is] disregarded and the issue [is] determined from a consideration of competent evidence only").

⁸ The ICA noted:

[The court], in response to a question posed by defense counsel, stated that she had "glanced through" the article but "didn't really digest it very carefully[]" . . . [and] also commented:

There seems to be some belief, which I consider to be a mistaken belief, that an article that's published in a local newspaper is (A) going to be accepted to be the truth, the whole truth, and nothing but the truth by the [c]ourt; and (B) even if it was, that the [c]ourt is somehow unable to carry out its duties in terms of sentencing without being biased by a newspaper article.

Schaefer, 117 Hawai'i at 495, 184 P.3d at 810 (brackets omitted) (emphases added).

⁹ Canon 3(B)(2) of the Hawai'i Revised Code of Judicial Conduct states that "[a] judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public (continued...)

Finally, in light of the fact that Petitioners pleaded no contest to seventeen counts of theft in the third degree, HRS §§ 708-830 (Supp. 2005) and -832(1)(a) (Supp. 2005), one count of false and fraudulent statements, HRS § 231-36 (1993), and one count of willful failure to file return, HRS § 231-35 (1993), all having a maximum prison term of one year, the concurrent sentence of one year imprisonment was well within the court's discretion. Cf. State v. Akana, 10 Haw. App. 381, 384, 876 P.2d 1331, 1333 (1994) (stating that "where a defendant pleads guilty with full knowledge of the court's authority to impose an indeterminate term of imprisonment, the court's imposition of imprisonment does not ordinarily constitute an abuse of discretion"). Accordingly, it must be concluded on this record that the effect of any alleged improper conduct by Respondent as reflected in the newspaper article, was harmless beyond a reasonable doubt insofar as any allegation that such conduct improperly influenced the court is concerned.¹⁰

To correct the ICA decision, I believe certiorari should be accepted.



James E. Dubler, Jr.

⁹(...continued)
clamor or fear of criticism." (Emphasis added.) No claim is made that the court violated Canon 3(B).

¹⁰ Because it cannot be concluded that Petitioners were deprived of a fair and impartial sentencing hearing, the alternative remedy of venue change need not be decided.