NOT FOR PUBLICATION

NO. 24941

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
ROY WILLIAM DAHLIN, JR., Defendant-Appellant

APPEAL FROM DISTRICT COURT OF THE FIRST CIRCUIT
(WAHIAWA DIVISION)
(HPD Traffic No. 001161064)

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

Roy William Dahlin, Jr. (Dahlin), proceeding *pro se* below and on appeal, appeals the January 22, 2002 order of the Wahiawa division of the district court of the first circuit,[1] that denied his December 24, 2001 motion to set aside the court's July 10, 2001 judgment that convicted him of the offense of driving without a license, a violation of Hawaii Revised Statutes (HRS) § 286-102(a) (1993).[2] We dismiss this appeal for lack of jurisdiction.

I. Background.

At a hearing held on May 29, 2001, Dahlin was orally charged with driving without a license, driving a vehicle without

[1] The Honorable Fa'auuga To'oto'o presided over all proceedings in this case, except as otherwise noted, infra.

[2] Hawaii Revised Statutes (HRS) § 286-102(a) (1993) provides, in pertinent part, that "[n]o person . . . shall operate any category of motor vehicles listed in this section without first being appropriately examined and duly licensed as a qualified driver of that category of motor vehicles." HRS § 286-136(a) (Supp. 2002) provides, in relevant part, that "any person who violates section 286-102 . . . shall be fined not more than $1,000 or imprisoned not more than thirty days, or both[.]"

a safety check, driving without no-fault insurance, and delinquent motor vehicle tax, the offenses allegedly occurring on October 24, 1999. At the same time, Dahlin was orally charged with driving without a license, the offense allegedly occurring on April 27, 2001.

At a July 10, 2001 hearing, the court dismissed five citations including, apparently, the October 24, 1999 charges, upon Dahlin's June 28, 2001 written motion to dismiss for violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 48.[3] However, the court denied Dahlin's HRPP Rule 48 motion -- what the court referred to as a "second motion" -- to dismiss the April 27, 2001 charge. Trial on the April 27, 2001 charge immediately followed.

Honolulu police officer Edward Belcher (Officer Belcher) testified that on April 27, 2001, he saw Dahlin driving on a public road in Wahiawa. "I noticed his vehicle had expired registration and safety." Officer Belcher pulled Dahlin over and spoke with him. Officer Belcher asked for Dahlin's "driver's license, registration, proof of insurance or some other type of identification." Dahlin refused to produce the requested

[3] Hawai'i Rules of Penal Procedure (HRPP) Rule 48(b)(1) provides, in relevant part, that "the court shall, on motion of the defendant, dismiss the charge, with or without prejudice in its discretion, if trial is not commenced within 6 months . . . from the date of arrest if bail is set or from the filing of the charge, whichever is sooner, on any offense based on the same conduct or arising from the same criminal episode for which the arrest or charge was made[.]"

documents or any other form of identification. Thereupon, Officer Belcher arrested Dahlin for driving without a license. Nothing in the evidence at trial or in the record on appeal indicates that Officer Belcher cited Dahlin for any other traffic offense as a result of the April 27, 2001 traffic stop. The court found Dahlin guilty of driving without a license, and levied a seventy-five dollar fine, converted to fifteen hours of community service. Judgment was entered that day, July 10, 2001. Dahlin did not appeal the judgment.

On December 24, 2001, more than five months after entry of judgment, Dahlin filed a motion to set aside the judgment, based on a purported lack of "probable cause" for the April 27, 2001 traffic stop. Dahlin brought his motion "pursuant to Hawaii Rules of Penal Procedure (HRPP) [sic] [presumably, Hawai‘i Rules of Civil Procedure] Rule 60(b), 12(a), 12(b)(1), 12(b)(6), 12(c) and 12(d)(2)[sic]." In the memorandum in support of his motion, Dahlin cited the Fourth Amendment to the United States Constitution,[4] and claimed:

> During the bench trial on 10 July 2001, it was testified by [Officer Belcher] that his probable cause for the traffic stop was the expired safety check sticker.

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[4] The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

> Since the case for the alleged safety check was dismissed on 4 December 2001, then there was no safety check sticker in question. This act strikes the witness' reason for the traffic stop - probable cause.
> . . . .
> Therefore there existing no probable cause to stop [Dahlin] in his normal course of his daily business of his pursuit of life and liberty, the said witness had no lawful reason to effect a traffic stop of [Dahlin]. The necessary and all important probable cause was dismissed along with the alleged cause of action case by the Honorable Judge Kibe on 4 December 2001 at the rural District Court of Wahiawa, Oahu as Case TR 3; 4; 5. In fact [Dahlin's] person and effects were violated by said witness by committing an unlawful stop of [Dahlin] on a public right of way.

Attached to Dahlin's motion were copies of three judgments entered by the court[5] on December 4, 2001, dismissing three citations written against Dahlin--date of incident or incidents not appearing in the record--for violation of HRS §§ 249-10 (1993) (delinquent motor vehicle tax), 286-25 (1993) (driving a vehicle without a safety check), and 431:10C-104 (Supp. 2002) (driving without no-fault insurance), respectively. Handwritten entries on the first judgment noted: "State req cont - Off - in training def Objects - cont denied 30 days to Re-File[.]" The dismissals were without prejudice.

The court heard Dahlin's motion to set aside judgment on January 22, 2002. During the hearing, the court expressed its concern about

> whether this thing's filed timely after the verdict was issued on July. You have 30 days either to file a motion to set aside, or ask for a new trial or set aside the verdict. That should have been done after the verdict that was rendered of [sic] July of last year, so that's way beyond 30 days, and the right to appeal.

[5] The Honorable Gerald H. Kibe, judge presiding.

In conclusion, the court told Dahlin: "you have submitted no basis for this Court to reconsider it's [sic] verdict, and therefore, your motion to set aside is denied."

Dahlin then requested that the court hear two other motions he had purportedly "incorporated" into the memorandum in support of his motion to set aside judgment, motions Dahlin described as "the two last motions that were submitted in the case that was dismissed for safety check expiration." These motions were listed in the memorandum as:

> A. Respondent's Notice [Motion] To Dismiss With Prejudice Due To Lack of *in rem* Jurisdiction, filed 23 October 2001;
> B. Respondent's Motion For Dismissal Due To Lack Of *venue* Jurisdiction, filed 3 December 2001.

"Incorporation" of the two motions was justified thus:

> In the interest of conserving judicial resources, those afore mentioned [sic] motions although incorporated into this instant case and identified are only referenced within. Should [the State] and/or Presiding Judge wish to have said filing(s) all that is needed is their statement of that desire.

Neither the court nor the State had copies of the two motions before the hearing. After Dahlin provided copies at the hearing, the deputy prosecuting attorney told the court that the motions were "for different citations, not for these cases." Dahlin confirmed: "That's correct. However, I motioned that these will be included in this motion." Thereupon, the court decided, "the [c]ourt will not accept these documents for this case, Mr. Dahlin."

The court's January 22, 2002 denial of Dahlin's motion to set aside judgment was noted in the court's calendar as a denial of a "motion to reconsider sentence." Dahlin utilized this terminology in his February 20, 2002 notice of appeal of the denial, but on appeal calls the denied motion a motion to set aside judgment.

II. Discussion.

Where the trial court lacks jurisdiction to enter an order, this court lacks jurisdiction to hear an appeal of that order. Gilmartin v. Abastillas, 10 Haw. App. 283, 296, 869 P.2d 1346, 1352 (1994). Here, Dahlin did not appeal the July 10, 2001 judgment within the thirty-day period prescribed by Hawai'i Rules of Appellate Procedure Rule 4(b)(1).[6] And by any colorable characterization of Dahlin's December 24, 2001 motion to set aside judgment, it was neither permitted nor timely. We conclude we lack jurisdiction to entertain this appeal, because the court did not have jurisdiction to hear Dahlin's motion.

Essentially, Dahlin's motion to set aside judgment was a motion to suppress evidence. Cf. Anderson v. Oceanic Properties, Inc., 3 Haw. App. 350, 355, 650 P.2d 612, 617 (1982) ("it is the substance of the pleadings that control, not its nomenclature" (citation omitted)). He argued that the court's

[6] Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(b)(1) provides: "In a criminal case, the notice of appeal shall be filed in the circuit, district, or family court within 30 days after the entry of the judgment or order appealed from."

December 4, 2001 dismissal of purportedly predicate traffic citations eviscerated "probable cause"[7] for the April 27, 2001 traffic stop, and hence, Officer Belcher's resulting discovery that Dahlin would not produce a driver's license should have been suppressed.[8] However, because a motion to suppress must be brought before or during trial, see State v. Matias, 51 Haw. 62, 63-64, 451 P.2d 257, 258-59 (1969), and because Dahlin brought his motion more than five months after the entry of a final judgment that he did not appeal, the court lacked jurisdiction to hear it. Cf. State v. Meafou, 67 Haw. 41, 44-45, 677 P.2d 461, 462 (1984) ("time limitations in filing a motion for new trial have been considered by courts to be jurisdictional and must be strictly complied with" (citations omitted)).

To be sure, Dahlin's motion to set aside judgment was not one of the permitted post-judgment motions, and even if it was, it was untimely and the court lacked jurisdiction to

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[7] Only "reasonable suspicion" of an offense, and not "probable cause," is necessary to justify a traffic stop. Kernan v. Tanaka, 75 Haw. 1, 37, 856 P.2d 1207, 1225 (1993).

[8] We observe that the essential argument put forth on appeal by Defendant-Appellant Roy William Dahlin, Jr.--that the court's December 4, 2001 dismissal of allegedly associated traffic citations means that there was no "probable cause" for the April 27, 2001 traffic stop in this case--is belied by the record, which indicates that the dismissals were due to the absence of the arresting officer at trial. The dismissals were without prejudice, with leave to re-file in thirty days. Presumably, if the court had found that there was no substance to the dismissed traffic citations, the dismissals would have been with prejudice. At any rate, there is nothing in the record to indicate that the dismissed traffic citations were in any way associated with, much less predicates to, the April 27, 2001 traffic stop. See 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.)).

entertain it. If it was a motion for judgment of acquittal, which it was not, it was untimely, HRPP Rule 29(c) ("a motion for judgment of acquittal may be made or renewed within 10 days after the jury is discharged or within such further time as the court may fix during the 10-day period"); State v. Reed, 77 Hawai'i 72, 83, 881 P.2d 1218, 1229 (1994) (the trial court lacks jurisdiction to hear an untimely motion for judgment of acquittal), overruled on other grounds by State v. Balanza, 93 Hawai'i 279, 288, 1 P.3d 281, 290 (2000); if it was a motion for new trial, which it was not, it was untimely, HRPP Rule 33 ("A motion for a new trial shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period."); Reed, 77 Hawai'i at 83, 881 P.2d at 1229 (the trial court lacks jurisdiction to consider an untimely motion for new trial); Meafou, 67 Haw. at 44-45, 677 P.2d at 462 (same); if it was a motion in arrest of judgment, which it was not, it was untimely, HRPP Rule 34 ("The court on motion of a defendant shall arrest judgment if the charge does not allege an offense or if the court was without jurisdiction of the offense alleged. The motion in arrest of judgment shall be made within 10 days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 10-day period."); and if it was a motion to reduce a sentence or correct a sentence imposed in an

illegal manner, which it was not, it was untimely. HRPP Rule 35 (a motion to reduce a sentence or correct a sentence imposed in an illegal manner must be made, in all relevant circumstances, "within 90 days after the sentence is imposed"); State v. Williams, 70 Haw. 566, 570-71, 777 P.2d 1192, 1195 (1989) (the trial court lacks jurisdiction to decide an untimely motion for reduction of sentence). See also HRPP Rule 45(b) ("[T]he court may not extend the time for taking any action under Rules 29, 33, 34 and 35 of these rules and Rule 4(b) of the Hawai'i Rules of Appellate procedure, except to the extent and under the conditions stated in them.").

Nor can it be said that Dahlin's motion to set aside judgment was one of the post-judgment motions that can be brought at any time. It was clearly not a motion to correct an illegal sentence. HRPP Rule 35 ("The court may correct an illegal sentence at any time . . . ."). It was not a HRPP Rule 40 motion, because "Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. An issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable

to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure." HRPP Rule 40(a)(3). Dahlin nowhere explains why he could not have questioned the substantive sufficiency of the purportedly predicate traffic citations at any of the earlier venues listed in HRPP Rule 40(a)(3). Finally, contrary to Dahlin's assertion, his motion to set aside judgment did not pertain to jurisdiction, for a Fourth Amendment motion to suppress seeks to suppress evidence and not to oust jurisdiction, and while a successful motion to suppress may result in dismissal, such dismissal is for insufficiency of any remaining evidence and not for lack of jurisdiction. We disagree with Dahlin's insistence that his motion to set aside judgment was jurisdictional by virtue of its "incorporation" of two purportedly jurisdictional motions, for Dahlin admitted at the hearing on his motion that the "incorporated" motions were directed at other citations. Besides, for our purposes the only thing that was jurisdictional about the "incorporated" motions is their titles. Despite their centrality in Dahlin's arguments on appeal, Dahlin has failed to in any manner include them or their substance in this record on appeal. See 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.)).

III. Conclusion.

Based on the foregoing, we dismiss this appeal for lack of jurisdiction.

DATED: Honolulu, Hawaii, September 16, 2003.

On the briefs:

Roy William Dahlin, Jr.,
defendant-appellant, *pro se.*

Chief Judge

Alexa Fujise,
Deputy Prosecuting Attorney,
City & County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge