*****NOT FOR PUBLICATION*****

NO. 25707

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

WILLIAM SANGSTER AHOLELEI, Petitioner/Petitioner-Appellant

vs.

STATE OF HAWAIʻI, Respondent/Respondent-Appellee

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(S.P.P. NO. 02-1-0075)

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

This court entered an order granting the January 4, 2005 Application for Writ of Certiorari filed by Petitioner/Petitioner-Appellant William Sangster Aholelei (Petitioner).[1] In that regard, the December 10, 2004 Summary Disposition Order of the Intermediate Court of Appeals (ICA SDO) affirming the March 6, 2003 "Order Denying [Petitioner's Hawaiʻi

[1] Pursuant to Hawaiʻi Revised Statutes (HRS) § 602-59 (1993 & Supp. 2004), a party may appeal the decision of the Intermediate Court of Appeals (ICA) only by an application to this court for a writ of certiorari. See HRS § 602-59(a). In determining whether to accept or reject the application for writ of certiorari, this court reviews the ICA decision for:

> (1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal.

HRS § 602-59(b). The grant or denial of a petition for certiorari is discretionary with this court. See HRS § 602-59(a).

Rules of Penal Procedure (HRPP) Rule 40] Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner From Custody" of the Circuit Court of the First Circuit[2] is reversed, and the case remanded to the first circuit court with instructions to hold a hearing on the petition and to appoint counsel for Petitioner if Petitioner qualifies for appointed counsel.

I.

A.

The following matters are set forth in the briefs of the parties. According to Respondent/Respondent-Appellee State of Hawai‘i (the prosecution), complaints were filed against Petitioner on March 14, 1997 for kidnapping and terroristic threatening in the first degree. On May 27, 1997, Petitioner and the prosecution reached a plea agreement in which Petitioner would plead no contest to the kidnapping charge and in return, the prosecution would move to *nolle prosequi* the charge of terroristic threatening in the first degree. The parties further agreed that Petitioner could move for a deferred acceptance of no contest plea (DANCP), and the prosecution was free to oppose such a motion.

On May 27, 1997, Petitioner pleaded no contest to the charge of kidnapping and Petitioner, through his attorney, filed a written motion for a DANCP stating that he was a "first time offender" and had "never been in criminal court before." On

[2] The Honorable Sandra A. Simms presided.

September 16, 1997, the prosecution filed a motion to *nolle prosequi* the terroristic threatening in the first degree charge. The Adult Probation Department (APD) filed its Presentence Diagnosis and Report (Report) on July 2, 1997, and copies were given to the court, the prosecution, and Petitioner's attorney on July 10, 1997.

The Report indicated that Petitioner's motion for deferral should not be granted because Petitioner had been granted a similar motion in 1987 in California for a felony type charge. APD believed that due to the prior California motion, Petitioner did not qualify for a second deferral. The prosecution apparently argued that Petitioner had been previously convicted of a crime in California. On September 16, 1997, Judge Del Rosario sentenced Petitioner to five years' probation with a special condition, inter alia, of jail confinement of forty-seven days with credit for time already served, in effect, denying Petitioner's motion for DANCP.

B.

During his probationary period, Petitioner was convicted of new crimes under Cr. Nos. 01-1-0023 and 00-1-0626. Petitioner apparently pled no contest to the offenses of theft in the second degree under Cr. No. 01-1-0023 and three counts of theft in the second degree and one count of theft in the third degree under Cr. No. 00-1-0626. The prosecution filed its Motion for Revocation of Probation and Resentencing (Motion to Revoke).

On November 19, 2001, the Order of Resentencing was filed revoking Petitioner's probation and resentencing him to an "open" ten-year prison term to run concurrently with the sentences in Cr. Nos. 01-1-0023 and 00-1-0626, and giving "Credit for Time Served."

II.

Petitioner filed his HRPP Rule 40 petition on October 23, 2002, alleging four separate grounds. On November 18, 2002, the prosecution filed an answer addressing grounds one through three. The Attorney General addressed Ground four. On December 5, 2002, Petitioner filed an opposition to the prosecution's answer and a motion for appointment of counsel for evidentiary hearing. On December 19, 2002, Petitioner filed a "Second Motion to Appoint Counsel and Motion to Correct Credit for Time of the Detention Prior to Sentence Pursuant to [Hawai'i Revised Statutes (HRS)] § 706-671(2)" (Petitioner's Second Motion) and raised an additional issue of "his credit for time of detention prior to sentence."

In her March 6, 2003 Order, Judge Simms ruled that Petitioner's four requests for relief were patently frivolous and without merit, and that Petitioner's request for "presentence credit to be verified" was outside the scope of HRPP Rule 40; the court accordingly denied the petition without an evidentiary hearing.

III.

In his application, Petitioner maintains that (1) "[t]he prosecuting attorney lied . . . by stating to the [j]udge that Petitioner should not have [a] (DANC) because [P]etitioner was a convicted felon[] . . . [,]" (2) "[t]his false statement . . . caused the [j]udge to erroneously den[y] me the 'DANC' or the deffered [sic] acceptance to my plea bargain . . . [,]" (3) his counsel was ineffective for failing to "contest this false statement . . . and failled [sic] to take other actions to correct this unjust [sic] against [P]etitioner[,]" (4) his trial counsel "Paul Cunny [sic] sent one of his attorneys P. McPherson to represent me at sentencing, . . . [who] asked Judge Simms to sentence (me) consecutively with all other charges . . . and I spoke out . . . and asked the judge to please sentence me concurrently with my other charges."[3] Petitioner also states he "ask[s] the [s]upreme [c]ourt to please . . . check the court records[,] . . . [he] is not an attorney and know [sic] little about the law and may have difficulty obtaining these records[,] . . . Petitioner . . . has limitation [sic] mentally and physically because Petitioner had been assualted [sic] by prison gang (USO) and was almost murdered in [sic] Oct-3-03."

IV.

In its answering brief, the prosecution responded to

[3] As to this matter, the court did impose the sentences in Cr. Nos. 97-578, 00-1-00626, and 01-1-0023 to run concurrently.

inter alia, the foregoing arguments. As to Petitioner's argument (1), the prosecution concedes that "within [the prosecution's] answer" "[t]he [prosecution] mistakenly stated, 'Petitioner was convicted in Alameda County, California[.]'" The prosecution also acknowledges that "this mistaken fact also seems to be part of the reasoning by Judge Simms for denying Petitioner's Petition."

Nevertheless, it argues that "the error was harmless beyond a reasonable doubt because even without the mistaken fact, Judge Simms correctly denied Petitioner's Petition . . . since he advanced no colorable claim[,]" i.e., that "he received ineffective assistance of counsel regarding proceedings before Judge Del Rosario." The prosecution argues that "[i]n his written motion on behalf of Petitioner, Petitioner's attorney clearly states that it is his belief that Petitioner was qualified for a deferral since Petitioner was a 'first time offender'. See R.A. at 15[,]" and "nothing in the Record suggests Judge Del Rosario acted with the belief Petitioner was a convicted felon."

As to Petitioner's argument (2), the prosecution maintains that "even if what Petitioner says is true, there was no loss of a 'potentially meritorious defense.'" According to the prosecution, "Petitioner has not shown that the outcome for the instant case would have been changed even if Petitioner's attorney, as he alleges in his Petition, did not act upon the information that Petitioner provided." It argues that "[t]he

record shows that the Report filed by [APD] and given to Judge Del Rosario, Petitioner through his attorney, and [the prosecution], all reflected that Petitioner did **not** have a conviction on his record that would preclude him from getting a deferral. See, Report at 4-5, 9." (Boldfaced emphasis in original.) The prosecution further contends that "Petitioner in this case failed to provide the necessary transcripts from any previous court date, specifically those on May 27, 1997 and September 16, 1997, the dates Petitioner alleges his counsel acted ineffectively." According to the prosecution, Petitioner has failed to . . . show that Judge Del Rosario believed Petitioner had a felony conviction in California[] . . . [and] that Judge Del Rosario used that belief as a basis for his decision to deny the deferral, as required."

Alternatively, the prosecution states that "[a]ssuming *arguendo*, that Judge Del Rosario determined that a petitioner had a felony conviction and it precluded Petitioner from receiving a deferral, . . . the **ultimate** outcome of the case is not changed [because t]he standard deferral period for a class B felony is at minimum five years, . . . with the maximum possibility of ten years[,] **H.R.S.** § 853-1(b) (2002 Supp.)[,] . . . the fact he committed subsequent offenses within that time period would have had his deferral set aside and allowed the court to resentence in a manner similar to when probation is revoked. **H.R.S.** § 853-3 (1993 Repl.)[.]" (Boldfaced font in original.)

V.

Petitioner filed a counterstatement (reply brief) to the answering brief. As to argument (1), he reiterates that "my attorney at the time did not take due diligance [sic] and properly refute and respond, let alone object to the prosecutor's false claims." According to Petitioner, "only after the prosecutor objected to my attorney [sic] motion for a "DANCP" using false information concerning my past history that the Honorable Judge Del Rosario denied [his] motion." He denies the error was harmless for "'DANCP' . . . was denied me[,] . . . there is real harm, and a lack of fairness . . . [,]" and requests that this court "grant my 'DANCP' plea [sic] for the 1997 offense which will positively affect my present status and time of incarceration."

VI.

As to Petitioner's argument (3), the ICA essentially states that "a claim for ineffective assistance of counsel or that the circuit court erred in denying his DANC plea [was not established because Petitioner's] counsel argued for the deferred acceptance, and the circuit court's denial does not render [Petitioner's] counsel ineffective." ICA SDO at 3. The ICA also declares that the court "did not err in denying [Petitioner's] Rule 40 Petition without a hearing because [Petitioner] did not show a colorable claim." Id. The ICA did not address Petitioner's request for correction of his presentence credit.

VII.

Petitioner's allegations are to be taken as true although his conclusions need not be. State v. Allen, 7 Haw. App. 89, 92, 744 P.2d 789, 792 (1987). Thus, Petitioner's first allegation, that the prosecuting attorney incorrectly stated at sentencing that Petitioner was disqualified for a DANCP because Petitioner was a convicted felon -- must be taken as true. Moreover, this allegation is not denied by the prosecution. Further, the prosecution admits that in its answer to the Rule 40 petition, it incorrectly stated that Petitioner had been previously convicted. As mentioned previously, the prosecution also concedes that this erroneous statement "also seems to be part of the reasoning by Judge Simms for denying" the petition.

VIII.

Although the prosecution states that the Report reflected that Petitioner did not have a conviction, the Report stated that "[t]he [Petitioner] is ineligible for a deferral of his nolo contendere plea, as he was granted a similar motion in Alameda County, California on May 18, 1987 for a firearms offense." In this regard, HRS chapter 853, entitled "Criminal Procedure: Deferred Acceptance of Guilty Plea, Nolo Contendere Plea," governs motions for deferred acceptance of no contest pleas such as that made by Petitioner in the underlying criminal case. HRS § 853-4 sets forth exclusions from deferral consideration, including the following, which are relevant here:

> This chapter shall not apply when:
> . . . .
> (8) The defendant has a prior conviction for a felony committed in any state, federal, or foreign jurisdiction;
> . . . .
> (11) The defendant has been charged with a felony offense and has been previously granted deferred acceptance of guilty plea status for a prior offense, whether or not the period of deferral has already expired;

HRS §§ 853-4(8), (11) (emphases added).

The Report prepared by the APD lists as part of Petitioner's "Adult Record" the following three offenses and dispositions in Alameda County, California:

> 05/14/87 12031(A) PC-Carry Loaded Firearm: Public Place
> 05/18/87 Prosecution Diversion/Deferral Program
>
> 04/19/87 242 PC-Battery
> 04/20/88 Released/detention only/insufficient evidence
>
> 04/30/88 242 PC Battery
> 05/03/88 Prosecution rejected/victim unavailable/victim declined to testify

(Emphases added.) The Report posits that "[t]he defendant is ineligible for a deferral of his nolo contendere plea, as he was granted a similar motion in Alameda County, California on May 18, 1987 for a firearms offense." (Emphases added.)

As applied in this case, the legislature contemplated in HRS § 853-4(8) that a prior conviction in another state would exclude a defendant from consideration under HRS chapter 853 and preclude said defendant from receiving a deferred acceptance of a no contest plea. In HRS § 853-4(11), the legislature contemplated that a "previously granted" deferral for a prior offense would similarly exclude a defendant from receiving a deferred acceptance. However, in this clause, the legislature did not refer to a "previously granted" deferral in another state

as being a ground for disqualifying defendant from deferral consideration. Thus, it can be reasonably concluded that the legislature did not intend that a prior deferral from another jurisdiction would disqualify a defendant from receiving a deferral in this state. See In re Water Use Permit Applications, 94 Hawai‘i 97, 151, 9 P.3d 409, 463 (2000) (explaining that "where the legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion" (brackets and internal quotation marks omitted)). Hence, it was error for the prosecution to argue Petitioner had a prior conviction and, arguably, error for the APD to contend that Petitioner was disqualified because of a prior deferral in California.

IX.

The prosecution argues, however, that, assuming arguendo Judge Del Rosario was influenced by the prosecution's argument or the Report, the error was harmless beyond a reasonable doubt because the "ultimate" result would be the same. As previously mentioned, Petitioner was convicted of new crimes during his probationary period and his probation was subsequently revoked and Petitioner sentenced to prison. An order granting a DANCP imposes conditions similar to those imposed on a sentence of probation. See State v. Kaufman, 92 Hawai‘i 322, 328, 991 P.2d 832, 838 (2000) ("[T]he DAG plea deferral period is closely

analogous to a "probationary period."); see, e.g., United States v. Bosser, 866 F.2d 315, 317 (9th Cir. 1989) (recognizing that Hawaii's "deferred-acceptance rule is designed as a form of punishment, representing Hawaii's judgment that in some circumstances crime is more appropriately sanctioned by a probation-like sentence than by the stigma of a permanent criminal record"); People v. Peretsky, 616 P.2d 170, 172 (Colo. Ct. App. 1980) (recognizing that revocation of probation is closely analogous to revocation of deferred sentence). The breach of such DANCP order conditions may lead to revocation and prison. In this case probation was revoked because Petitioner had been convicted of three new crimes. However, the prosecution's argument that the error was harmless beyond a reasonable doubt is not persuasive. Assuming Petitioner would have been granted his DANCP, it is speculation as to what effect a DANCP as opposed to a conviction would have ultimately had on Petitioner's subsequent prison sentence or on the setting of his minimum sentence. In this regard he argues that the granting of his DANCP "will positively affect his present situation and time of incarceration."

That Petitioner be able to move for a DANCP and request consideration for such a plea was a condition of the plea agreement. If the first circuit court was under the misapprehension that Petitioner was ineligible for a DANCP either through the prosecution's argument or the Report, then Petitioner should have a new hearing on his DANCP.

X.

Petitioner apparently moved for an attorney for his Rule 40 appeal. This request was denied. As mentioned, he maintains that he knows little about the law and may have difficulty obtaining records. The prosecution points out that Petitioner failed to obtain transcripts of the May 27, 1997 and September 16, 1997 hearings. Petitioner is presently incarcerated at Waiawa Correctional Facility. Counsel would be necessary to review the court record, obtain the appropriate transcripts, and marshall the evidence. This court has held "that counsel may be appointed in post conviction proceedings at the discretion of the court." State v. Levi, 102 Hawai'i 282, 288, 75 P.3d 1173, 1179 (2003). The Levi court further noted that:

> The constitutional right to assistance of counsel under the sixth amendment of the United States Constitution, [sic] does not apply to habeas corpus proceedings. The petition here is one for post-conviction collateral remedy. Appointment of counsel for an indigent in such proceedings is discretionary with the court. Appointment may be properly made if the petition raises substantial issues which require marshalling of evidence and logical presentation of evidence and logical presentation of contentions. No such issue has been raised in this case.

Id. (quoting Engstrom v. Naauao, 51 Haw. 318, 321, 459 P.2d 376, 378 (1969)) (brackets and emphasis in original). "Appointment may be properly made if the petition raises substantial issues which require marshalling of evidence and logical presentation of evidence and logical presentation of contentions." Id. (quoting Naauao, 51 Haw. at 321, 459 P.2d at 378) (emphasis omitted). It would appear under the circumstances that counsel should be

appointed for Petitioner in this case if he so qualifies.

Additionally, the prosecution on appeal in effect concedes an error in the credit for time served given Petitioner:

> In any event, the Record reflects that Petitioner was sentenced consistent with the guidelines set forth under [HRS] § 706-671 except for one minor mistake. Judge Simms imposed a sentence of 10 years incarceration, specifically giving Petitioner "credit for time served." See R.A. at 23. In the Judgment, Guilty Conviction, and Probation Sentence filed by Judge Del Rosario on September 16, 1997, ("1997 Judgment") Petitioner was given credit for a total of 47 days presentence incarceration, the period of time from his arrest to his release on bail for this particular charge. See R.A. at 18. However, based on the "Record of Presentence Credits" provided by Corrections and a letter to Petitioner dated December 5, 2002 from HPA, Petitioner was given credit for 46 days, a loss of one day. See S.P.P. R.A. at 91 and 94. This seems to be the only possible error made in the calculation of presentence detention for Petitioner.

The first circuit court was incorrect in ruling that the question of time served was "outside" HRPP Rule 40. HRPP Rule 40 permits a defendant to challenge the miscalculation of time served. HRPP Rule 40(a)(2)(iii) provides that "[a]ny person may seek relief under the procedure set forth in this rule from custody based upon a judgment of conviction, on the following grounds: . . . any other ground making the custody, though not the judgment, illegal." (Emphasis added.) The attorney general appeared in this special proceeding. Therefore, the court should have considered Petitioner's credit claim. However, inasmuch as we remand for a hearing on the petition, the circuit court must consider the question of credit for time served.

XI.

The December 10, 2004 ICA SDO is reversed, the March 6, 2003 order of the court denying Petitioner's Rule 40 petition

without a hearing is vacated and the case remanded to the court (1) to hold a hearing on the case and (2) to appoint counsel if Petitioner qualifies for appointed counsel.

DATED: Honolulu, Hawai‘i, February 14, 2005.

William Sangster Aholelei,
petitioner/petitioner-
appellant *pro se*, on the
application.