NO. 22654

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
VICTOR MICHAEL FERRER, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT
OF THE FIRST CIRCUIT, ʻEWA DIVISION
(D.C. Complaint No. 99100093)

ORDER UPON RECONSIDERATION
OF OPINION FILED ON MARCH 30, 2001
(By: Burns, C.J., Watanabe, and Lim, JJ.)

Upon reconsideration of this court's March 30, 2001 opinion in this case, we decline to amend the opinion.

In moving for reconsideration, Defendant-Appellant Victor Michael Ferrer (Defendant) argued for the first time on appeal that the Hawaiʻi Supreme Court's decision in State v. Wilson, 92 Hawaiʻi 45, 987 P.2d 268 (1999), required suppression of the intoxilyzer test results.

We initially note that Defendant filed his opening brief on October 18, 1999. The supreme court filed the Wilson decision on October 28, 1999. At no time prior to our decision, issued on March 30, 2001, did Defendant seek to amend his opening brief. Under Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(j), "[p]arties may, by letter to the appellate clerk, bring to the appellate court's attention pertinent and

significant authorities published after a party's brief has been filed, but before a decision."

Moreover, HRAP Rule 40(b), which governs the contents of a motion for reconsideration, provides, in pertinent part, that "[t]he motion shall state with particularity the points of law or fact that the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised." (Emphasis added.) Although no Hawai'i case appears to have addressed the issue of whether new issues may be raised by a party on a motion for reconsideration, the Hawai'i Supreme Court has stated that in "instances where Hawai'i case law and statutes are silent, this court can look to parallel federal law for guidance." State v. Ontai, 84 Hawai'i 56, 61, 929 P.2d 69, 74 (1996) (quoting Price v. Obayashi, 81 Hawai'i 171, 181, 914 P.2d 1364, 1374 (1996)).

In Pentax Corp. v. Robison, 135 F.3d 760 (Fed. Cir. 1998), the United States Court of Appeals for the Federal Circuit addressed whether, based on the parallel Federal Rules of Appellate Procedure (FRAP) Rule 40(a),[1] a party could seek

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[1/] At the time Pentax Corp. v. Robison, 135 F.3d 760 (Fed. Cir. 1998), was decided, Federal Rules of Appellate Procedure (FRAP) Rule 40(a) provided, in pertinent part: "The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present."

The relevant portion of FRAP Rule 40 was subsequently amended and renumbered as Rule 40(a)(2), effective December 1, 1998, to provide, in pertinent part: "**Contents**. The petition must state with particularity each

(continued...)

reconsideration based on an issue that had not been raised on appeal. Answering negatively, the court explained:

> [W]e find no evidence that this theory was raised on appeal in the briefing or during oral argument. A petition for rehearing must "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." [FRAP Rule] 40(a); *see also* Fed. Cir. R. 40(b)(2). In this case, the government's theory was not overlooked or misapprehended. The theory was not presented on appeal. Just as this court will not address issues raised for the first time on appeal or issues not presented on appeal, we decline to address the government's new theory raised for the first time in its petition for rehearing. *See United States v. Bongiorno*, 110 F.3d 132, 133 (1st Cir. 1997) ("[A] party may not raise new and additional matters for the first time in a petition for rehearing."); *Wells v. Rushing*, 760 F.2d 660, 661 (5th Cir. 1985) (citing cases supporting the proposition that issues not raised before the court are not addressed on rehearing).

Id. at 762 (emphasis added).

Similarly, the First Circuit Court of Appeals in Anderson v. Beatrice Foods Co., 900 F.2d 388 (1st Cir. 1990), concluded that a party was precluded from raising a due process claim for the first time on a motion for reconsideration. The court explained:

> [Appellants] did not make the due process claim below. They did not make it in the supplemental briefing before us. They did not make it at oral argument. We have routinely held that (1) a suitor's first obligation, on pain of waiver, is "to seek any relief that might fairly have been thought available in the district court before seeking it on appeal," *Beaulieu v. United States Internal Revenue Service*, 865 F.2d 1351, 1352 (1st Cir. 1989); and (2) that an appellant's brief on appeal fixes "the scope of issues appealed" so that an appellant cannot resurrect an omitted claim "merely by referring to it in a reply brief or at oral argument," *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983). A fortiori, a party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals.

[1/](...continued)
point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition."

Id. at 397 (emphasis added).

Like the courts in Pentax Corp. and Anderson, we agree that Defendant failed to assert "points of law or fact" that this court "overlooked or misapprehended" when he raised the Wilson issue, for the first time on appeal, in his motion for reconsideration. Defendant thus fixed the issues on appeal, and, although he had ample time to do so, Defendant did not avail himself of the opportunity to supplement his opening brief to include the Wilson issue. Accordingly, we decline to amend our opinion to address the issue.

As to the other issue[2] raised by Defendant in his motion for reconsideration, we are unpersuaded by Defendant's arguments.

DATED: Honolulu, Hawai‘i, May 24, 2001.

Timothy I. MacMaster
for defendant-appellant.

Bryan K. Sano,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

[2/] Defendant-Appellant Victor Michael Ferrer also argued that our opinion "may have misapprehended, and thus misconstrued, [his] argument that '[i]n this particular case, there's no evidence that a duly licensed intoxilyzer supervisor either performed or supervised the breath test at issue.'"