NO. 27841

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Respondent/Plaintiff-Appellee

vs.

GEORGE LACY, III, Petitioner/Defendant-Appellant

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CITATION NO. 1554402MH)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.; With Acoba, J., Concurring Separately and Dissenting)

The petition for writ of certiorari[1] filed by *pro se* Petitioner/Defendant-Appellant George Lacy, III (Petitioner) on August 16, 2007, was accepted on September 20, 2007. Petitioner seeks review of the judgment of the Intermediate Court of Appeals (the ICA) filed on July 9, 2007, issued pursuant to its June 25, 2007 Summary Disposition Order (SDO)[2] affirming the March 8, 2006

[1] Pursuant to Hawai'i Revised Statutes (HRS) § 602-59 (Supp. 2006), a party may appeal the decision of the intermediate appellate court (the 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 [ICA] 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).

[2] The SDO was issued by Associate Judges Corinne K.A. Watanabe, Daniel R. Foley, and Craig H. Nakamura.

judgment of the district court of the third circuit[3] (the court), convicting Petitioner of operating a vehicle without being properly licensed and sentencing him to 30 days in jail and fines/fees totaling $77.00.

The ICA's decision contained grave errors of law. The ICA's judgment is vacated, and its SDO is vacated in part insofar as it denied Petitioner's ineffective assistance of counsel claim, and affirmed in all other respects. The judgment of the court is affirmed, but without prejudice to the filing of a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition within thirty days of this court's judgment, and without prejudice to appointment of counsel, and with instructions to the court to suspend execution of mittimus until the HRPP Rule 40 proceeding, if filed, is resolved.

I.

With respect to the charges herein, the ICA states that:

> On August 15, 2005, [Respondent] charged [Petitioner] via a Complaint with one count of Operation of a Vehicle Without a Certificate of Inspection, in violation of [HRS] § 286-25 (1993) (Count I), and one count of Driving Without a License, in violation of HRS § 286-102(a) (Supp. 2004) (Count II). [Respondent] subsequently dismissed Count I. The [court] found [Petitioner] guilty of operating a vehicle without being properly licensed (Count II)[.]

SDO at 1 (emphases added). The facts of this traffic case are set out in the Answering Brief which states as follows:

> On June 7, 2005, at approximately 1:50 p.m., Officer Kenneth Ishii, a police officer with the Hawaii County Police department . . . observed a yellow pickup truck

[3] The Honorable Joseph P. Florendo, Jr. presided.

traveling on Route 11, at approximately the 72 to 73 mile marker, . . . displaying an expired safety check sticker.

Officer Ishii conducted a traffic stop on the . . . truck and identified the driver and sole occupant of the yellow pickup truck as [Petitioner].

Officer Ishii asked [Petitioner] to provide him with some type of identification, preferably something with a picture. [Petitioner] provided Officer Ishii with an identification card which contained [Petitioner's] name, a photograph of [Petitioner] with a beard, and which stated that [Petitioner] was an ordained minister.

Officer Ishii asked [Petitioner] to provide him with his driver's license. [Petitioner] was unable to comply with Officer Ishii's request for [Petitioner's] driver's license.

Officer Danny Freeman . . . , at approximately 1:50 p.m., arrived at the scene . . . to assist Officer Ishii in identifying the driver of the yellow pickup truck who could not provide Officer Ishii with a driver's license. Officer Freeman identified [Petitioner] as the driver and sole occupant of the "mostly yellow" . . . truck and the person to whom he issued traffic citations that day for having an expired safety check and for driving without a license. Officer Freeman was familiar with [Petitioner] as Officer Freeman had arrested [Petitioner] "numerous times" and [Petitioner] was known by Officer Freeman to have misrepresented his identity "on numerous occasions."

Linda J. Morgan [(Morgan),] the owner of Anuenue Natural Food Deli and Bakery . . . employs [Petitioner] as her bookkeeper and accountant. Although Morgan testified that [Petitioner] worked for her in her office, located in the center of her store, on June 7, 2005, from 12:00 p.m. to 5:00 p.m., Morgan stated that normally she would be at the counter running the cash register, or she could be working on an order, or she could be cooking in the kitchen, or doing miscellaneous things working on the telephone. Morgan also testified that [Petitioner] is "a very independent worker and doesn't need supervision." Morgan conceded that she would not have direct line of sight of the office doorway where [Petitioner] worked for every minute, and that her "eyes weren't on him every minute of that five hours" and that she "would not have continuously seen him for the whole fiver hours." Finally, Morgan stated that Lacy owned and drove a yellow pickup truck to get to her store.

On January 25, 2006, [the court] . . . found that [Respondent] had proved beyond a reasonable doubt that [Petitioner] had committed the offense of Driving Without a License, . . . § 286-102(a), [HRS], as amended.

The . . . charge of having an expired safety check was dismissed by [Respondent.]

II.

According to Petitioner, however,

[o]n or about 8 July [] 2005 Petitioner found two traffic citations dated 7 June [] 2005, on the dashboard of a friend[']s 1980 Toyota pickup truck upon which he was working.

> Count one: Citation number 1554401MH no safety check [HRS §] 286-25.
> Count two: Citation number 1554402 driving without a license [HRS §] 286-102.

In connection with his defense that there was no probable cause to stop the vehicle, Petitioner states that "[a]t trial Petitioner provided the court with the registration, insurance card and safety check for the time frame. That inspection decal is still visible on the 1980 Toyota Pickup. Petitioner[']s due process at minimum [was] violated along with his civil rights and no probable cause for the alleged incident." (Emphasis added.)

In connection with an alibi defense, he contends that:

> [(1) O]n the [sic] 7 June [] 2005, . . . Petitioner was working at Anuenue Natural Foods. Written confirmation was provided in Petitioner[']s pretrial motions by letter from owner of the business[,] see pretrial motions exhibit B, and by work records at the trial, which were accepted and later rejected at the trial by the judge. Owner, [Morgan] of the business provided oral confirmation at the trial and Petitioner[']s debit/credit work sheet, which was accepted at the trial, and later during arguments refused. [Petitioner's] right to a fair trial was denied due to [Respondent's] suppression of evidence. (Citing State v. Moriwaki, 71 Haw. 347, 791 P.2d 392 (1990).).
> [(2) T]he tickets were in violation of Hawaii [Civil Traffic] Rules [(HCTR)] Rule 7 in that said citations were not filed within the ten working day period to the Traffic Violations Bureau or the district court.

(Emphasis omitted.)

In connection with his ineffective assistance of counsel claim, Petitioner maintains:

> At the hearing on 9 November [] 2005[,] pretrial motions were made due for 14 December [] 2007. [He] tried to get public defender Joan Jackson to help write pre trial motions. She did nothing and Petitioner had to write his to own [sic] to get them in by the deadline. . . .
> Also, at the 9 November [] 2005 hearing Petitioner asked counsel to obtain a true copy of the Kau police department work records for the 7 June [] 2005 day of the alleged tickets, as Petitioner remembered Officer Freeman, in a case I was peripherally involved, as being on the

> midnight shift or still on admiistrative leave for a prior perjury charge. . . .
>
> . . . [A]t the 9 November [] 2005 hearing Petitioner asked counsel to verify the date the citations were . . . entered into the record. According to the of [sic] [HCTR] Rule 7 the citations had a ten day period from writing to filing at the district court. . . . [C]ounsel did nothing.

(Emphases added.)

In connection with his judicial bias claim, Petitioner asserts:

> [T]rial courts must advise criminal defendants of their right to testify and must obtain on-the-record waiver of that right in every case in which the defendant does not testify. [Tachibana v. State,] 79 [Hawai'i] 226, 900 P.2d 1293 [(1995)]. [Petitioner's] constitutional and statutory right to testify in [Petitioner's] own defense was violated where judge reproached [Petitioner] to follow [Petitioner's] attorney's advice and thus refrain from testifying, . . . and [such error was] not harmless beyond a reasonable doubt. [State v. Silva,] 78 [Hawai'i] 115, 890 P.2d 702 [(App. 1995), because w]here decisive issue in case was credibility, and there was extensive contradiction between [Respondent's] witnesses and [Petitioner's] witnesses, a reasonable possibility existed that violation of [Petitioner's] right to testify contributed to [Petitioner's] conviction; . . . [State v. Hoang,] 94 Haw. 271, 12 P.3d 371 [(App. 2000)].
>
> On 8 August [] 2007 [the court] erred and showed bias but [sic] not continuing agreed upon stay of execution of sentence and remanded Petitioner to begin mittimus on 20 August [] 2007.

(Emphases added.)

Except for rejection of Petitioner's ineffective assistance claim, the ICA held that "[Petitioner] does not present any arguments for his remaining points on appeal; thus, his points are waived[]" under "Hawai'i Rules of Appellate Procedure Rule 28(b)(7)[.]" SDO at 2. Thus the SDO did not discuss the other points any further.

III.

Petitioner raised the following points in his application.

> Point one: Whether the trial judge erred and showed bias in not dismissing the case due to no probable cause since the vehicle in the alleged incident had a current inspection sticker at time of the incident and therefore there was no reason for stopping the Petitioner?
>
> Point two: Whether there was ineffective assistance of counsel when no evidence was obtained as to the police officers being on duty at the date and time of the alleged infraction?
>
> Point three: Whether there was ineffective assistance of counsel when no evidence was obtained to refute the violation of Rule 7 of the [HCTR] to wit; "The officer or some other person authorized by the issuing entity shall file the original of the notice of infraction with, or transmit an electronic copy of the notice of infraction to, the Traffic Violations Bureau or District Court in the circuit where the alleged infraction occurred, no later than ten (10) calendar days after the date the notice is issued"?
>
> Point four: Whether there was ineffective assistance of counsel when Petitioner had to file his pretrial motions with no help from said counsel?
>
> Point five: When the trial judge erred and showed bias in not recusing himself from the case due to prior occurrences with Petitioner?
>
> Point six: Whether the trial judge erred and showed bias in not reminding Petitioner that he had a right to give sworn testimony at trial?
>
> Point seven: Whether the trial judge erred and showed bias in directing Petitioner to jail before the appeal process was finished?

(Emphases added.)

Respondent did not file a memorandum in opposition.

IV.

A.

As to point 1, Petitioner maintains that "Petitioner[']s due process . . . was denied by the Respondent[] not showing probable cause for the citations being written. . . . Respondent[] dropped the charge of no expired safety decal and thus admitted that there was no probable cause for the citations." At the beginning of trial the safety check charge was dropped because Respondent could not prove the safety check had expired.

> [PROSECUTOR]: The other charge, your Honor, the safety charge, I received information that the State would not be able to establish that the safety check was expired on June 7, 2005. Therefore, the State will be moving to dismiss that charge with prejudice.
> THE COURT: I'll allow dismissal.

(Emphasis added.) HRS § 286-25, entitled "Operation of a vehicle without a certificate of inspection," states that "[w]hoever operates, permits the operation of, causes to be operated, or parks any vehicle on a public highway without a current official certificate of inspection, issued under section 286-26, shall be fined not more than $100." HRS § 286-26, entitled "Certificates of inspection," states in relevant part as follows:

> (b) All other vehicles, . . . having a gross vehicle weight rating of 10,000 pounds or less, . . . shall be certified as provided in subsection (e) every twelve months.
> . . . .
> (e) . . . [I]f the vehicle is found to be in a safe operating condition, a certificate of inspection shall be issued upon payment of a fee . . . . A sticker . . . shall be affixed to the vehicle at the time a certificate of inspection is issued. . . .

(Emphasis added.)

Thereafter Petitioner represented himself. Making a motion to dismiss, Petitioner argued there was no probable cause to stop the vehicle because the safety sticker was "on the vehicle" and the sticker was not expired.

> THE DEFENDANT: Your Honor, I make a motion to dismiss because there's no probable cause, those tickets, because the probable cause was -- supposed no insurance or I mean no inspection. That stuff would have been in the truck -- if I had been in it, your Honor, at the time and shown it to the police officer. I have a copy -- or I had it out of the -- from the vehicle. I have the inspection. I have the insurance, and it would have been current at the time. I also have the registration of the vehicle here at that time.
> THE COURT: That's a moot point because the [c]ourt has allowed -- has granted the State's request to dismiss the charge of no safety check.
> THE DEFENDANT: I'm saying that with them dismissing that, then the whole thing becomes moot because there's no probable cause for the stop. The probable cause -- the stop

was supposed to be because of the no inspection which is on there on the vehicle, and the sticker was on the vehicle. It's not mine, but it was on there. They are using a felonious reason to stop me in the first place.

THE COURT: In order to rule on that issue, I'll have to take evidence. So I'll consider that argument during the course of the trial. If you want me to rule on it after I've heard evidence, I'll do so. If you want me to rule at the end of the case, then I can wait until then as well.

THE DEFENDANT: Okay.

THE COURT: But as I understand the facts and from what you already said, you didn't have the documents with you at the time of the stop.

THE DEFENDANT: I said I wasn't in the vehicle at the time, that the documents were in the vehicle, that's where I got them from.

THE COURT: So you didn't -- so the documents were not shown to the police officer?

THE DEFENDANT: I don't know because I wasn't at the vehicle when this alleged occurrence, on date of this alleged occurrence.

THE COURT: All right. So those are facts that the [c]ourt will need to consider. . . .

(Emphases added.)

With respect to the stop, Officer Ishii testified as follows:

DIRECT EXAMINATION

. . . .

[PROSECUTOR] Q. Officer, why did you stop Mr. Moore or Mr. Lacy that day?

A. Expired safety check.

Q. How did you determine that?

A. By looking at the safety check.

Q. The sticker?

A. Yes, sir.

(Emphases added.) However, on cross-examination, Officer Ishii agreed "the inspection date" was "6/05":

THE DEFENDANT: It's an inspection -- inspection for at the time of the processing

(Defendant's Exhibit A was marked for identification.)

[DEFENDANT] Q. Is the expiration date on that license 6/30/05 on that inspection? The 6th stands for the month, isn't it?

A. I'm trying to read what it says.

THE COURT: Is that Exhibit A?

THE CLERK: Yes.

THE COURT: Exhibit A is being shown to the witness.

THE WITNESS: Are you talking about the inspection date, sir?

BY THE DEFENDANT:

Q. Yeah, when it expired.

A. 6/05.
Q. Okay. So you're testifying that on 6/7 that I was driving with a faulty inspection. And this was -- this would have been in the vehicle at the time.
THE COURT: Please step back, sir, so that the reporter can record what you're saying.
THE WITNESS: I did not give you the safety check violation, sir.
BY THE DEFENDANT:
Q. You said that you stopped the vehicle --
A. Yes, sir.
Q. -- for a faulty inspection.
A. Yes, sir.
Q. It says here, and I know that the vehicle in question had an inspection decal on it.
A. But it did not have the current vehicle inspection.
Q. It sure did.
[PROSECUTOR]: Objection, Judge. I ask that the defendant not argue with the witness.
THE COURT: Sustained. Just ask questions.
THE DEFENDANT: Okay.
Q. (By the Defendant) This is saying otherwise; is that not correct?
A. As I see right there, yes, sir.
THE DEFENDANT: So -- no further questions.
THE COURT: Redirect.
[PROSECUTOR]: Could I see what's been marked as Defendant's exhibit No. 1 or B?
THE COURT: It's A.
[PROSECUTOR]: A, I'm sorry. All right, thank you.
REDIRECT EXAMINATION
BY [THE PROSECUTOR]:
Q. Officer Ishii, despite the fact that the defendant has shown you what purports to be a safety check, your testimony is still that you stopped the vehicle because the safety check decal was not current.
A. Yes, sir.
[PROSECUTOR]: No further questions.

(Emphases added.) Officer Freeman admitted on cross-examination that the expiration date was 06/05, as follows:

[FREEMAN]: You want me to tell you what the expiration date is?
BY MR. LACY:
Q. Uh huh, for that. You're saying that the car was out of inspection. I'm saying that it shows that it wasn't and there was a decal on it that shows it wasn't.
A. Well, it's kind of hard read [sic], but it kind of looks like it says, expiration 06/05.
Q. 06/05?
A. (Nods head affirmatively.)
Q. Okay. And the tickets were written in June so the car was not out of inspection?
[PROSECUTOR] Judge, I object. It calls for a legal conclusion. The [c]ourt can examine the defendant's exhibit.

> THE COURT: Sustained. You don't have to answer that question.

(Emphases added.) After Officer Freeman's testimony, the prosecutor indicated he had no further witnesses, and the following transpired.

> [PROSECUTOR]: Your Honor, the State would also -- I did not mark this as an exhibit because I wasn't intending to include it, but I would also like to mark this as State's Exhibit No. 2. It is a one sheet -- one page declaration from the Hawaii County Police Department. It is sealed and original signature that says that they were unable to determine the safety check status of a vehicle with license place [sic] number HBS 642 on June 7, 2005. And let the record reflect I'm showing to the defendant a copy of that document.
> THE COURT: All right, any objection?
> THE DEFENDANT: It does say yes or no so --
> THE COURT: Is that a document under seal as well.
> [PROSECUTOR]: Yes, your Honor.
> THE COURT: All right, I'll receive the exhibit.

(Emphasis added.) Petitioner gave his closing arguments and the court ruled that there was sufficient probable cause to stop the vehicle because "the safety check sticker had expired."

> THE COURT: Any closing statements, Mr. Lacy?
> THE DEFENDANT: One, I do not own any vehicles. I have the registration vehicle to the vehicle, Ruth Nichols. I have the yellow inspection sticker that states that this -- that the vehicle was inspected. I also have here for that time of the incident, I have the current insurance card registered to Ms. Nichols, Ruth Nichols. These would have all been in the vehicle; that also on that date of the alleged incident, as I said these are all current -- these were current last year to June 30.
> I'm not talking any other time because the these tickets were written for June 7th. So they were -- to me, if anything, it's harassment that they say the reason for the stop was faulty inspection. Well, this proves otherwise. I can't help it that the State's document can't prove that there was an inspection at the time because I had the document in evidence that it was inspected.
> . . . .
> THE COURT: So first of all, I'll rule on your motion to suppress for lack of probable cause and find that there was probable cause to stop the defendant on the date in question. . . .
> Officer Ishii testified that he observed the defendant operating the motor vehicle on Route 11 on June 7th at approximately 1:50. He observed that the safety check sticker had expired and thus stopped the defendant. So

> that's sufficient evidence of probable cause to support the stop of the defendant on the motor vehicle.

(Emphases added.)

Although marked for identification, the record does not indicate Exhibit A was offered in evidence.

Petitioner did not raise the expired sticker defense in his opening brief, although he did raise ineffective assistance of counsel pre-trial for failing to aid in filing his pretrial motions or to meet with him to discuss the case. See discussion infra. However, he declared in his reply brief that the safety sticker was "current" in answer to Respondent's allegation of an "expired safety sticker" and "probable cause to stop."

B.

Respondent's answering brief did not address the probable cause issue and seemingly argued the substantial evidence standard for sustaining the conviction was satisfied. Respondent related that (1) at trial "Officer Ishii identified [Petitioner] as the driver of the mostly yellow pickup truck he pulled over on June 7, 2005, after he observed an expired safety check sticker on the vehicle[]"; (2) "Officer Freeman also identified [Petitioner] as the driver of a mostly yellow Toyota pickup and was familiar with [Petitioner] as Officer Freeman had arrested [Petitioner] numerous times and was aware the [Petitioner] had misrepresented his identity to police on numerous occasions[]"; (3) "[Petitioner's] alibi witness, [Morgan], conceded on cross-examination that she did not have

direct line of sight of the office doorway where [Petitioner] worked . . . and that she 'would not have continuously seen him for the whole five hours' that [Petitioner] claims to have been working at Morgan's store on June 7, 2005"; (4) "[the court] stated [in part,] 'I'll attach less weight to Ms. Morgan's testimony and more weight to the officer's [sic] testimony. . . . [Morgan] . . . does concede that she did not have him in line of sight at all times[.]"

As to review of the conviction on appeal, this court has held:

> [E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (quoting State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997) (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996))). "'Substantial evidence' as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Id. (quoting Eastman, 81 Hawai'i at 135, 913 P.2d at 61).

Based on the foregoing, the court apparently decided that Officer Ishii had observed an expired sticker although Respondent itself could not prove the safety sticker had expired.

Petitioner appeared to have adduced proof through cross-examination of the officers that the safety sticker was not outdated. Some ambiguity not expressly resolved arises from whether the documents were "on" the vehicle or "in" the vehicle.

Whatever doubts existed, the court apparently resolved the matter in favor of Respondent. At the least the record indicates a colorable question as to whether the safety check was expired. Realistically, in acting *pro se*, Petitioner was at some disadvantage in making an appropriate record. In light of the foregoing, an appropriate motion to suppress for lack of probable cause should have been filed pre-trial by trial counsel. Under the circumstances, the matter should be resolved in a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 proceeding regarding ineffective assistance of counsel during the pretrial phase. See discussion infra.

V.

Seemingly as to points 2, 3, and 4 relating to Petitioner's ineffective assistance claim, the ICA ruled that (1) "[a]s to [Petitioner's] trial counsel's performance during pre-trial, [Petitioner] fails to meet his burden of demonstrating that his counsel provided ineffective assistance[,]" and (2) "[a]t the outset of trial, [Petitioner] voluntarily relinquished his right to have an attorney." SDO at 2. Respondent states that Petitioner has the "burden to demonstrate '1) that there were specific errors or omissions reflecting

counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.'" (Quoting State v. Mikasa, 110 Hawai'i 441, 449, 134 P.3d 607, 615 (2006).).

VI.

Specifically as to point 2, Petitioner declares "Petitioner asked counsel to obtain a true copy of the Kau police department work records for . . . 7 June [] 2005[,] . . . as provided in Hawaii Rules of Penal Procedure Rule 16.1[,]" citing Nakagawa v. Heen, 58 Hawai'i 316, 568 P.2d 508 (1977) ("There is no absolute privilege under common law or statute that insulates police records from discovery in a civil or criminal case[.]"). As noted above, Petitioner contends "Petitioner remembered Officer Freeman . . . as being on the midnight shift or still on administrative leave for a prior perjury charge."

Respondent argues that "both officers testified at trial that they were employed as police officers with the Hawaii County Police Department and were on duty on June 7, 2005." Such records, if contradictory of the officers' testimony, may raise reasonable doubt. Petitioner did not raise a request to obtain the work record of Officer Ishii who made the stop based on an alleged expired safety sticker, obtained Petitioner's identification, and subsequently determined that Petitioner was driving without a license. But because Officer Ishii could not

confirm identification of the driver, Officer Freeman was called to the scene to identify Petitioner from previous arrests. Thus, it was Officer Freeman who made the identification and issued the citations. This matter is best resolved in a HRPP Rule 40 proceeding. See discussion infra.

VII.

As to point 3, Petitioner reiterates "there had to be a violation of [HCTR] Rule 7 in that the citations were not filed in the proper court or jurisdiction in a timely manner, ten days." Petitioner correctly points out in his Reply Brief, page 2, that Respondent does not address this contention. The effect of the failure to file a notice of infraction per HCTR Rule 7 is not plain from the Rules. Assuming arguendo a failure to file within ten days, Petitioner provides no authority or legal analysis as to what the effect of such a failure would be and, hence, further discussion is not required.

VIII.

As to point 4, Petitioner asserts that "counsel . . . would not assist Petitioner in drafting the . . . motions necessary in a proper defense[,]" rendering counsel's representation ineffective, citing State v. Richie, 88 Hawai'i 19, 960 P.2d 1227 (1998). In his opening brief, Petitioner stated that the

> [c]ircuit court's assigned public defender would not meet with [Petitioner] to discuss [the] case or file motions similar to those filed by [Petitioner] on 13 December[.] Case was remanded to district court . . . . At that hearing a pretrial conference was scheduled for 14 December [] 2005, with pretrial motions due before that day. Newly assigned

> public defender would not file motions that [Petitioner] that filed on his own behalf on 13 December [] 2005. Public defender would not discuss case with [Petitioner].

(Emphases added.)

Respondent stated in its Answering brief that (1) "[t]he record on appeal does not contain any testimony or evidence, other than [Petitioner's] own self-serving allegations, that his court-appointed counsel refused to file any motions or refused to discuss this case with [Petitioner,]" (2) "[d]efense [c]ounsel's [a]ppearance filed on August 30, 2005, contains a Demand for Discovery[,]" and (3) "[c]opies of [c]itation[s] . . . were provided to [Petitioner's] . . . attorney . . . and these citations state that they were issued to [Petitioner] by Officer Freeman after a traffic stop . . . by Officer Ishii . . . [who] observ[ed Petitioner's] vehicle displaying an expired safety check sticker."

However, at trial Petitioner did complain to the court of a lack of assistance by counsel. Defense counsel made no comment or response.

> THE COURT: Has the State had a chance to review the motions filed on December 13th?
>
> [PROSECUTOR]: Judge, my -- I did not review those motions because Mr. Lacy was being represented by Ms. Jackson. And these motions were not filed by her so I'd ask that these motions filed by Mr. Lacy without the approval of Ms. Jackson not be heard by the [c]ourt. . . .
>
> . . . .
>
> THE COURT: Well, let me ask Ms. Jackson. Do you have any comment, Ms. Jackson?
>
> MS. JACKSON: No. No comment, your Honor.
>
> THE COURT: Mr. Lacy, do you have any comment?
>
> [PETITIONER]: Yes. I was not aware that I even had a lawyer. I've never had a lawyer and district court -- the court-appointed lawyer I had was in [c]ircuit [c]ourt when this case was moved there. These cases -- this was filed before I was even aware that I was even -- since I had counsel, and I haven't agreed to her anyway and I don't

> really believe she's been in my favor on what's going on in the matter because I showed her these motions after the last hearing date we had in December on the 14th for a pretrial conference, and she just ignored it, said they weren't any good.
>
> Well, this is what I believe in what's happened so I'm not even sure I'm even getting proper counsel if -- she's almost treating me like I'm guilty without even reading or having anything to do with my motions.
>
> THE COURT: Well, you're -- are you saying that you don't want the public defender to represent you?
>
> [PETITIONER]: Evidently if she's not filing these motions here and it needs her approval of these motions that are, to me, part of the major part of this whole case. The motions are here --

(Emphases added.)

In his motion to suppress, Petitioner stated "[v]ictim hereby moves this court to suppress all evidence obtained from police officer Danny Freeman, hereinafter State's Witness, as it is perjured." In his opening brief he states that "[t]he [c]ourt was remiss in denying Motion to Suppress due to the bias of the . . . Judge and the police officer issuing citation." At trial, however, Petitioner did move "to dismiss" based on a lack of probable cause to stop. Also, as mentioned before, in his reply brief Petitioner did argue there was no probable cause to stop the vehicle. As he states, "[t]he vehicle to this day still has the current safety sticker on in [sic] for that time frame and [Petitioner] provided in court that the inspection, safety and insurance were current at that time."

As related above, Respondent dismissed the safety inspection charge at the beginning of trial because it "would not be able to establish that the safety check was expired on June 7, 2005." Petitioner indicated appointed district court counsel had appeared with him for a pretrial conference and "ignored" his

motions. According to Petitioner counsel was "almost treating [him] like [he's] guilty." Counsel filed no motions and made no response to Petitioner's complaints.

If, as it appears from the record there is a colorable claim that Petitioner's safety sticker was not expired, there was a potentially meritorious defense that the stop was without probable cause, the stop was thus illegal and any evidence derived therefrom must be suppressed.

The determination of whether the safety sticker had expired would seem to be an elemental inquiry to be made by counsel. Based on the record, a motion to suppress for lack of probable cause to stop should have been filed by counsel pre-trial. Under the circumstances there is a colorable claim that "'there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and . . . that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.'" (Quoting State v. Mikasa, 110 Hawai'i 441, 449, 134 P.3d 607, 615 (2006).). Accordingly,

> where the record on appeal is insufficient to demonstrate ineffective assistance of counsel, but where: (1) the defendant alleges facts that if proven would entitle him or her to relief, and (2) the claim is not patently frivolous and without trace of support in the record, the appellate court may affirm defendant's conviction without prejudice to a subsequent [HRPP] Rule 40 petition on the ineffective assistance of counsel claim.

State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 593 (1993) (emphasis added). Based on the matters stated above,

Petitioner's conviction should be affirmed without prejudice to filing a HRPP Rule 40 petition.

IX.

As to judicial bias relating to points 5, 6, and 7, Respondent maintained, (1) that "[Petitioner] filed his Motion to Recuse on December 13, 2005," (2) "[Petitioner] failed to comply with the requirements of HRS § 601-7(b),"[4] (3) "[Petitioner's] Motion to Recuse filed on December 13, 2005, did not comply with the requirement of HRS § 601-7(b) as it did not include an affidavit accompanied by a certificate of counsel of record (at that time the Office of the Public Defender) that the affidavit was made in good faith," (4) "[Petitioner's] court-appointed public defender filed an Appearance on August 30, 2005, and remained [Petitioner's] counsel until January 25, 2006, when the trial court relieved . . . [the] public defender from 'any further responsibilities in this case.'" Respondent is correct that no affidavit of counsel accompanied the declaration flied by Petitioner as required by HRS § 601-7(b).

---

[4] HRS § 601-7(b) states in pertinent part:

> (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 . . . . 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 . . . ; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith.

(Emphasis added.)

Second, Respondent stated, "Nevertheless, [the court] correctly denied [Petitioner's] Motion to Recuse."

> THE COURT: . . . In your motion, you simply state that the [c]ourt has a search -- your motion says that you have served several subpoenas and other papers and you've had other matters that -- and because of that, you feel that I have a bias towards you so the fact that you have traffic tickets in the past or that you've served subpoenas or other papers on the [c]ourt does not affect my review of the facts.
>
> I do find I have no personal bias or prejudice against you.

(Emphases added.) According to Respondent,

> [i]n State v. Brown, 70 Haw. 459, 776 P.2d 1182 (1989), the Hawaii Supreme Court noted that a judge should not disqualify himself or herself where "the circumstances do not fairly give rise to an appearance of impropriety and do not reasonably cast suspicion on his impartiality." Id. at 467 n.3, 776 P.2d at 1188 n.3 (emphases in original). . . . Brown [said] the "appearance of impropriety" may still require recusal even absent bias in fact. Nevertheless, "bad appearances alone do not require disqualification. Reality controls over uninformed perception." State v. Ross, 89 Hawai'i 371, 380, 974 P.2d 11, 20 (1999).

(Emphases in original.)

X.

As to point 5, Petitioner states:

> Petitioner watch trial judge beg the Petitioner from serving legal papers on him. The judge made a fool of himself by running . . . a [sic] hiding himself in his chambers. The Petitioner, also, was a witness on paperwork putting a million dollar common law lien on the Judge's property. Since that time Petitioner has never felt he got fair treatment in that particular courtroom. . . . [J]udge erred and showed bias . . . where . . . judge said Respondent[']s witness did not have to answer a question because it called for a legal conclusion.

These matters do not appear to be in the record. Respondent does not address the alleged incident in its Answering Brief except as related in Part IX herein. Based on the solitary reference in Petitioner's declaration to subpoenas and other papers served on the court as giving rise to bias, it cannot be concluded the

court abused its discretion in apparently determining that the circumstances related in Petitioner's declaration did not fairly give rise to an appearance of impropriety or reasonably cast suspicion on the court's impartiality.

XI.

As to point 6, Petitioner contends "Petitioner was not allowed to testify in his own behalf. Petitioner should have been advised than [sic] about his right to testify in his own behalf." (Citing Tachibana, supra.) This point does not appear to have been raised in Petitioner's points on appeal and was not discussed by the ICA . But in fact the court appears to have given Petitioner Tachibana warnings at the beginning of his trial. See Tr. at 4-5, 33.

XII.

As to point 7, Petitioner argues:

> [J]udge again showed his bias by not continuing Petitioner[']s stay of execution of sentence[, citing HRS] § 641-14[, entitled "]Stay in criminal cases[,]" (a) [t]he filing of a notice of appeal or the giving of oral notice in open court at the time of sentence by the defendant . . . of intention to take an appeal may operate as a stay of execution and may suspend the operation of any sentence or order of probation, in the discretion of the trial court. . . . No stay granted . . . shall be operative beyond the time within which an appeal may be taken; provided that if an appeal is properly filed, the stay shall continue in effect as if the stay was based on a filing of the appeal. No violations were given.

(Emphasis added.) Petitioner requests that "the . . . court[']s judgment [be vacated] or in the alternative[,] declare a new trial with a different judge." (Emphasis added.)

This point does not raise a question of error related to the ICA's judgment. HRS § 602-59 allows a party to "seek

review of the [ICA's] decision and judgment or dismissal order only by application to the supreme court for a writ of certiorari . . . ." Inasmuch as Petitioner's seventh point concerns the court's alleged error in attempting to execute mittimus before the entire appellate process had concluded, and not an error committed by the ICA, it does not fall under HRS § 602-59.

XIII.

Based on the foregoing, the ICA's judgment is vacated, and its SDO is vacated in part insofar as it denied Petitioner's ineffective assistance of counsel claim, and affirmed in all other respects. The judgment of the court is affirmed, without prejudice to the filing of a HRPP Rule 40 petition within thirty days of this court's judgment, without prejudice to appointment of counsel, and with instructions to the court to suspend execution of the mittimus until the Rule 40 proceeding, if filed, is resolved.

DATED: Honolulu, Hawai'i, October 29, 2007.

George Lacy, III, *pro se*, on the application.