IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN RE SONNY BABAUTA,
Petitioner.

Supreme Court No. 2014-SCC-0005-CRM
Superior Court No. 13-0018

OPINION

Cite as: 2016 MP 6

Decided June 8, 2016

Jennifer Dockter, Saipan, MP, for Petitioner.

Emily Cohen and Betsy Weintraub, Assistant Attorneys General, Saipan, MP, for Respondent.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; PERRY B. INOS, Associate Justice; ROBERT J. TORRES, JR., Justice Pro Tem.

PER CURIAM:

¶ 1 Sonny Babauta ("Babauta") petitions for a writ of mandamus compelling the Office of the Clerk of Court, CNMI Superior Court ("Clerk") to comply with the NMI Supreme Court Rules regarding the assembly, certification, and transmittal of the record on appeal. For the reasons stated below, we DENY the petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 On February 25, 2014, Babauta filed a notice of appeal. On January 26, 2016, the Clerk filed the certificate of record, attesting the documents comprising the record on appeal, including pleadings, exhibits, and the transcript of proceedings, were available to the parties at the CNMI Superior Court Clerk's Office.

¶ 3 In another case pending before this Court, *Commonwealth v. Monkeya*, No. 2015-SCC-0003-CRM, Monkeya's counsel filed a petition for writ of mandamus, impelling the Clerk to comply with the Rules for the proper assembly, certification, and transmission of the appellate record.[1] Subsequently, Babauta filed a motion to stay the briefing schedule pending the outcome of the *Monkeya* petition, asserting the resolution of those issues was pertinent to his appeal. We denied the motion based on procedural deficiencies. On March 22, 2016, Babauta filed a motion to stay the appeal proceedings and concurrently filed a petition for a writ of mandamus.

II. JURISDICTION

¶ 4 We have the inherent power to issue "all writs necessary to the complete exercise of [our] duties and jurisdiction under [the] constitution and the laws of the Commonwealth." NMI CONST. art. IV § 3.

III. DISCUSSION

¶ 5 Babauta argues the Clerk failed to comply with the NMI Supreme Court Rules pertaining to the assembly, certification, and transmittal of the appellate record. He asserts the record is unreliable because it is incomplete and is not properly assembled. Due to these alleged deficiencies, Babauta claims he cannot proceed with his appeal brief, and thus, this Court must compel the Clerk to comply.

¶ 6 Issuance of a writ of mandamus is a drastic remedy invoked only in the "most dire of instances when no other relief is available." *Martens v. Superior Court*, 2007 MP 5 ¶ 16. Although writs are most frequently sought to review a lower court's order, writs may be directed to other individuals or entities under

[1] The petitioner in *Monkeya* filed a petition for writ of mandamus alleging similar issues as this instant writ regarding the establishment of the record on appeal.

NMI Supreme Court Rule 21(c). *See* FED. R. APP. P. 21 advisory committee's note to 1967 amendment ("Subdivisions (a) and (b) [of FED. R. APP. P. 21] regulate in detail the procedure surrounding the writs most commonly sought—mandamus or prohibition directed to a judge or judges. . . . Subdivision (c) sets out a very general procedure to be followed in applications for the variety of other writs which may be issued. . . .").[2] Here, Babauta seeks review of the Clerk's non-compliance with the NMI Supreme Court Rules regarding the establishment of the appellate record.

¶ 7 When evaluating a petition for writ of mandamus, we consider the five *Tenorio* factors:

> 1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
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> 2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
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> 3. The lower court's order is clearly erroneous as a matter of law;
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> 4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
>
> 5. The lower court's order raises new and important problems, or issues of law of first impression.

Commonwealth v. Namauleg, 2009 MP 13 ¶ 5 (citing *Tenorio v. Superior Court*, 1 NMI 1, 9–10 (1989)). We balance these factors in determining whether to exercise our judicial discretion to grant the extraordinary relief. *In re Buckingham*, 2012 MP 15 ¶ 7 (citing *Tenorio*, 1 NMI at 10).

A. Other Available Remedy

¶ 8 We consider whether Babauta has other available avenues "to attain the relief desired." *Namauleg*, 2009 MP 13 ¶ 5 (citing *Tenorio*, 1 NMI at 9–10). We held in *Tudela v. Superior Court* that we will generally deny a writ when the petitioner has another adequate remedy at law. 2006 MP 7 ¶¶ 12–13.

¶ 9 Babauta asserts he has no other avenue to seek relief apart from petitioning for a writ of mandamus. He argues the Clerk's non-compliance with the Supreme Court Rules is not a final order from which he could seek appellate review, and there is no procedural mechanism to remedy the deficient record.

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[2] The federal counterpart to Rule 21(c) is substantially identical to the language of our rule. COMPARE Fed. R. App. P. 21(c) WITH NMI Sup. Ct. R. 21(c). We look to federal interpretation of our rules where language is similar. *Commonwealth v. Palacios*, 2003 MP 6 ¶ 9 (stating it is proper to consider the interpretation of the counterpart federal rule when the Commonwealth rule is substantially similar).

¶ 10 Babauta's argument fails because NMI Supreme Court Rule 10(e) provides recourse to cure deficiencies in the record. Under Rule 10(e), parties can correct any material differences, omissions, or inaccuracies in the record by submitting the error to the Clerk or through stipulation. Thus, whatever portions of the record which were purportedly inaccurate or missing could have been cured through Rule 10(e). However, Babauta failed to show that he made any efforts to identify or reconcile the errors with the Clerk or the Commonwealth. Since he did not first resort to the available ordinary procedures, we conclude the first factor weighs heavily against issuing the writ.

B. Prejudice

¶ 11 Under the second *Tenorio* factor, Babauta bears the burden to demonstrate that he will be "prejudiced in a way not correctable on appeal." *Tenorio*, 1 NMI at 9. Babauta argues he cannot proceed with the appeal because the record is deficient. He generally alleges that the record is unreliable because it is incomplete; and thus, he is unable to make arguments in his brief.

¶ 12 We cannot conclude Babauta demonstrated prejudice. The alleged injury is unsubstantiated and at best, speculative. There is no showing how the deficient record prevents him from going forward with the appeal. At the time Babauta filed his petition, the Clerk had assembled a paper record, which included original papers filed with the Superior Court, a witness log sheet, and a certified list of docket entries.[3] Additionally, an electronic transcript of the trial proceedings was available. The items that were not assembled with the rest of the record included the trial court exhibits: Exhibit 1, Exhibit A, and Exhibit C.[4] Exhibit 1 is the Judgment of Commitment Order for Mathias Salasiban. Exhibit A is the Information, and Exhibit C is Jeffrey Lizama's plea agreement. Babauta has not explained nor can we possibly imagine how the lack of these trial exhibits precludes him from filing his appeal brief. Furthermore, his assertion is without merit because the alleged prejudice, if any, was correctable. Although the exhibits were not assembled with the record, they were available at the Clerk's office. Thus, he could have requested for the exhibits. Accordingly, we conclude the second factor also weighs against granting the writ.

C. Clearly Erroneous

¶ 13 Babauta argues the Clerk ignored NMI Supreme Court Rule 10(a) because the record did not include the certified copy of the docket entries, exhibits, and original papers filed with the Superior Court. Further, he alleges the Rules place specific duties upon the Clerk to assemble the record and those duties have not been met.

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[3] Babauta alleged that the certified list of docket entries was missing from the record, but the picture of the record, attached as exhibit C to his motion for stay showed the list on the top of the file.

[4] Exhibit 1, Exhibit A, and Exhibit C were the only exhibits admitted as evidence.

¶ 14 To satisfy the third *Tenorio* factor, Babauta must demonstrate the Clerk's conduct was clearly erroneous as a matter of law. *Tenorio*, 1 NMI at 9–10. We will find the Clerk's action to be clearly erroneous when we are "firmly convinced" that he erred as a matter of law. *In re Cushnie*, 2012 MP 3 ¶ 12 (quoting *Bank of Saipan v. Superior Court*, 2001 MP 5 ¶ 13).

¶ 15 We are not firmly convinced that the Clerk erred. In fact, the Clerk complied with Rule 10(a) because the documents comprising the record on appeal, including the copy of the docket entries, exhibits, and original papers filed with the Superior Court were available at the Clerk's Office. As stated *supra* ¶ 12, the documents that were not assembled with the rest of the record were the trial exhibits. But Rule 11(a) places specific duty upon the appellant—not the Clerk—in the assembly of record.[5] Therefore, although the trial exhibits were not assembled with the record, we cannot conclude that such exclusion by the Clerk was clearly erroneous.

D. Not an Oft-Repeated Error and Issue of First Impression

¶ 16 "The fourth and fifth *Tenorio* factors are usually opposite sides of the same coin and are rarely if ever present together." *Xiao Ru Liu*, 2006 MP 5 ¶ 15. Nonetheless, Babauta claims these two factors are present. We disagree.

¶ 17 The fourth factor requires Babauta to present "evidence showing a course of conduct of related . . . error." *Shaffer v. Superior Court*, 2007 MP 15 ¶ 14 (quoting *NMI Scholarship Bd. v. Superior Court*, 2007 MP 10 ¶ 8). In an effort to demonstrate that it is the standard practice of the Clerk to disregard the Court's rules on assembly and certification of record, Babauta cites one case—*Commonwealth v. Monkeya*, No. 2015-SCC-0003-CRM (Pet. Writ of Mandamus). He does not refer to any other cases where similar issues regarding the record were addressed to the Clerk. A single instance of an alleged error does not establish an oft-repeated error. *Office of the Attorney General v. Superior Court*, 1999 MP 14 ¶ 31. Therefore, we cannot conclude that the Clerk persistently disregarded the rules.

¶ 18 As to the fifth *Tenorio* factor, we conclude that this case raises an issue of first impression. We have not had to issue a decision on the Clerk's compliance with the NMI Supreme Court Rules before. Nonetheless, this factor alone is inadequate to grant a writ of mandamus. *NMI Scholarship Bd.*, 2007 MP 10 ¶ 8.

¶ 19 Having weighed the five *Tenorio* factors, we conclude issuance of a writ of mandamus is not warranted. We recognize Babauta's concerns, and we are not diminishing the importance of an appellant's right to a full and complete record for a meaningful appellate review. However, mandamus is a drastic remedy and must be used only in extraordinary situations. *Tenorio*, 1 NMI at 9.

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[5] NMI Supreme Court Rule 11(a) states "[a]n appellant filing a notice of appeal must comply with Rule 11-1 and must do whatever else is necessary to enable the Superior Court clerk to assemble and certify the record."

Especially where an ordinary procedure is available, as here, writ of mandamus is not the proper vehicle to seek redress.

V. CONCLUSION

¶ 20 For the foregoing reasons, we hereby DENY Babauta's petition for writ of mandamus and lift the stay of appellate proceedings.

SO ORDERED this 8th day of June, 2016.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
PERRY B. INOS
Associate Justice

/s/
ROBERT J. TORRES, JR.
Justice Pro Tem