Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

WENDY RIVERA Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	**S. Ct. Crim. No. 2008-052** Re: Super. Ct. Crim. No. 125/2007
MILAGRITOS CORREA Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	**S. Ct. Crim. No. 2008-054** Re: Super. Ct. Crim. No. 107/2007

On Appeal from the Superior Court of the Virgin Islands
Considered and Filed: April 14, 2009

ORDER OF THE COURT

PER CURIAM.

THESE MATTERS are currently before the Court on a December 29, 2008 Petition for Rehearing filed by Wendy Rivera (hereafter "Rivera") and a December 31, 2008 Petition for Rehearing and Joinder filed by Milagritos Correa (hereafter "Correa"), the appellants in these respective matters. In their petitions, Rivera and Correa (collectively "Appellants") seek reconsideration of this Court's December 17, 2008 order dismissing their appeals for lack of jurisdiction as untimely filed.

In the *Rivera* and *Correa* matters, the Superior Court entered two separate Orders of

Judgment & Commitment on February 1, 2008, ordering, *inter alia*, that Appellants jointly and severally pay restitution in the amount of $11,400.00. Thereafter, on May 15, 2008, Rivera filed her Motion to Modify Order of Judgment and Commitment, pursuant to Superior Court Rule 136,[1] requesting that the court eliminate the ordered restitution. Correa similarly moved, on May 19, 2008, to modify the Order of Judgment & Commitment. By order entered on June 6, 2008, the trial court denied Rivera's motion to modify, and by order entered on June 10, 2008, the court also denied Correa's motion to modify. On June 20, 2008, Rivera filed her Notice of Appeal [and] Notice of Intention to Proceed in Forma Pauperis. On June 23, 2008, Correa filed a similar Notice of Appeal and Intention to Proceed *in Forma Pauperis*.

The People of the Virgin Islands (hereafter "People"), the appellee in both matters, filed a Motion to Dismiss with this Court on December 3, 2008 and an Amended Motion to Dismiss on December 5, 2008. In its amended motion to dismiss, the People asserted that this Court lacked jurisdiction to hear both of these appeals because Appellants' respective notices of appeal were untimely filed. Although Supreme Court Rule 21(a) provides a party ten days to respond to a motion, neither Rivera nor Correa filed an opposition to the People's motion within the allotted period. Accordingly, this Court, guided only by the People's arguments, held in its December 17, 2008 order that a motion to modify made pursuant to Superior Court Rule 136 did not stay the time for filing of a notice appeal pursuant to Supreme Court Rule 5(b)(1),[2] and dismissed

[1] Superior Court Rule 136 reads:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after any order or other mandate issued upon affirmance of the judgment or dismissal of the appeal, received by the court has become final by reason of the expiration of the time limited for further appeal or review.

[2] Supreme Court Rule 5(b)(1) states, in relevant part:

Appellants' appeals for lack of jurisdiction. Neither Rivera nor Correa filed a response to the People's arguments with this Court until they filed their respective petitions for rehearing.

Supreme Court Rule 31, whose language parallels Federal Rule of Appellate Procedure 40, governs petitions for rehearing, and requires a litigant to "state with particularity the points of law or fact which . . . the Supreme Court has overlooked or misapprehended. . . ." V.I.S.CT.R. 31(a). "As suggested by the rule, petitions for panel rehearing should alert the panel to specific factual or legal matters *that the party raised*, but that the panel may have failed to address or may have misunderstood." *Easley v. Reuss*, 532 F.3d 592, 593 (7th Cir. 2008) (emphasis added). Appellate courts have consistently held that "[p]anel rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances," a court "shall not entertain arguments raised for the first time in a petition for rehearing." *Id. See also DeWeerth v. Baldinger*, 38 F.3d 1266, 1274 (2d Cir. 1994) ("It is well established . . . that arguments raised for the first time on a petition for rehearing are deemed abandoned unless manifest injustice would otherwise result."); *FDIC v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994) (holding that a court "will not entertain those thorny questions presented for the first time in a[] petition for rehearing" (internal quotation marks omitted)); *Am. Policyholders Ins. Co. v. Nyacol Prods., Inc.*, 989 F.2d 1256, 1264 (1st Cir. 1993) ("[A] party may not raise new and additional matters for the first time in a

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> In a criminal case, a defendant shall file the notice of appeal in the Superior Court *within ten days* after the entry of (i) the judgment or order appealed from . . . If a defendant makes a timely motion specified immediately below, an appeal from a judgment of conviction must be taken within ten days after the entry of the order disposing of the last such motion outstanding, or within ten days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:
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> (i) for judgment of acquittal pursuant to FED. R. CRIM. P. 29;
> (ii) for arrest of judgment pursuant to FED. R. CRIM. P. 34;
> (iii) for a new trial on any ground other than newly discovered evidence pursuant to SUPER. CT. R. 135; or
> (iv) for a new trial based on the ground of newly discovered evidence, pursuant to SUPER. CT. R. 135, if the motion is filed before or within ten days after the entry of the judgment. . . .

petition for rehearing."); *Costo v. United States*, 922 F.2d 302, 302-03 (6th Cir. 1990) ("[A]n argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing."); *Peter v. Hess Oil Virgin Islands Corp.*, 910 F.2d 1179, 1181 (3d Cir. 1990) (refusing to consider argument raised for the first time in a petition for rehearing when counsel provided "no legitimate excuse for failing to raise th[e] argument in a timely manner."); *Holley v. Seminole County Sch. Dist.*, 763 F.2d 399, 400-01 (11th Cir. 1985) (holding that arguments not originally made before appellate court will not be entertained on rehearing).

Extraordinary circumstances, in the context of a sentencing appeal, "require[] [the] appellant to show a 'possibility of injustice so grave as to warrant disregard of usual procedural rules.'" *United States v. Dale*, 154 Fed.Appx. 422, 423 (5th Cir. 2005) (quoting *McGee v. Estelle*, 722 F.2d 1206, 1213 (5th Cir. 1984)). Thus, even an appellant who can satisfy the plain-error test will not satisfy the extraordinary circumstances test without also demonstrating the potential for a grave injustice. *Id.*

Both Appellants argue in their petitions for rehearing that their appeals were not untimely pursuant to Rule 5(b)(1) because "the fact that a criminal defendant can file immediate appeal of an initial judgment and commitment and still pursue a motion to correct the sentence in the Superior Court does not lead to the conclusion that one must file the initial appeal, in the case of an illegal sentence or a sentence imposed in an illegal manner." (Rivera Petition at 3) (emphasis in original). Furthermore, Appellants contend that the Superior Court's order denying their motions to correct sentence are appealable orders, and it is those orders that they sought to appeal, rather than their underlying convictions. (Rivera Petition at 4.)

This Court notes that Rivera's notice of appeal expressly states that she seeks to appeal both the trial court's June 6, 2008 order denying modification of sentence "*and* the underlying

court order." (Rivera Notice of Appeal at 1.) Thus, at least with respect to Rivera, the Appellants clearly sought appellate review of both the Superior Court's denial of their Rule 136 motions and their underlying convictions. As this Court explained in its December 17, 2008 order, the filing of a Rule 136 motion with the Superior Court does not toll the time for filing a notice of appeal of the underlying judgment with this Court.[3] Accordingly, this Court did not err in holding that Appellants, to the extent they sought appellate review of the initial judgment, had filed their appeal out of time.

This Court recognizes, however, that, to the extent they sought appellate review of the Superior Court's denial of their Rule 136 motions, Appellants' notices of appeal may have been timely filed. Nevertheless, because Appellants never filed an opposition—let alone a timely one—to the People's motion to dismiss, they are raising this argument for the first time in their petitions for rehearing. Accordingly, Appellants must not only demonstrate that this Court misapplied the law, but make a showing of extraordinary circumstances.

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[3] In her Petition for Rehearing, Correa further contends that this Court erred in dismissing her action because Supreme Court Rule 5(b)(1) denies defendants the "fundamental right" of challenging an illegal sentence at any time and thus Rule 5(b)(1) is "void as contrary to the provisions of § 3 of the Revised Organic Act and 4 V.I.C. §§ 32 and 33." (Correa Petition at 3.) Correa argue that this Court's application of Rule 5(b)(1) causes results in disparate treatment of similarly situated defendants because "a defendant who seeks direct appeal from an illegal sentence to this Court will be heard while a defendant who first seeks redress from the Superior Court for the same illegal sentence within the 120-day jurisdictional period under Super. Ct. R. 136 will not," and that "[t]his result denies equal protection to similarly situated defendants." (Correa Petition at 3.) Correa further argues that this Court's order of dismissal violates due process because this Court only has jurisdiction over "final" judgments and "the sentencing provision of the Judgment and Commitment did not become final upon its entry on February 1, 2008" because "a judgment of an illegal sentence can never really be procedurally final because it is constitutionally void." (Correa Petition at 3.)

While it is true that a defendant who timely files a notice of appeal is treated differently than a defendant who fails to comply with this Court's procedural rules, the government has a "significant" interest in filing deadlines, for "[b]y limiting the time for filing appeals, the government is able to bring litigation to an end." *Talamantes-Penalver v. INS*, 51 F.3d 133, 137 (8th Cir. 1995). Correa's proposition, taken to its logical conclusion, would result in *every* statute or court rule codifying a filing deadline being found unconstitutional and require that courts grant litigants an unlimited time to submit a notice of appeal or other document. Likewise, it is well established that an incorrect order is "erroneous" and not "void." *See Ingvoldstad by Meyer v. Kings Wharf Island Enterprises, Inc.*, 593 F.Supp. 997, 1003 (D.V.I. 1984) (citing *Marshall v. Board of Education, Bergenfield, N.J.*, 575 F.2d 417, 422 (3d Cir. 1978)). Accordingly, this Court finds that Correa's arguments are wholly without merit.

Appellants have not met their heavy burden. As a threshold matter, neither Rivera nor Correa's counsel has proffered any explanation as to why no opposition was ever filed in response to the People's motion to dismiss. *See Peter*, 910 F.2d at 1181; *see also Rodriguez de Quinonez v. Perez*, 596 F.2d 486, 492 (1st Cir. 1979) (holding that it is "an intolerable imposition on our time and limited resources to grant a rehearing for the purpose of entertaining arguments addressed to that hitherto undisclosed statute" where counsel failed to subsequently explain the oversight). Furthermore, even if we were to excuse counsels' failure, Appellants have not provided this Court with *any* explanation in their petitions as to how a rehearing is necessary to prevent a manifest injustice. Even if this Court erred in dismissing Appellants' appeals, an erroneous decision, without a further showing of extraordinary circumstances, is insufficient to grant rehearing on the basis of new arguments the Appellants failed to make in the initial appellate proceeding. *See Dale*, 154 Fed.Appx at 423.

The premises having been considered, it is hereby

ORDERED that Appellants' Petition for Rehearing is **DENIED**; and it is further

ORDERED that this Court's December 17, 2008 order dismissing Rivera's appeal, S.Ct. Crim. No. 2008-052, and Correa's appeal, S.Ct. Crim No. 2008-054, for lack of jurisdiction is **RE-AFFIRMED**; and it is finally

ORDERED that copies of this Order be served on the parties' counsel.

SO ORDERED this 14th day of April, 2009.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court