IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

NATHAN G. AGUIRRE,
Defendant-Appellant.

Supreme Court Case No. CRA03-004
Superior Court Case No. CF0325-95

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted October 24, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; JOHN A. MANGLONA and RICHARD H. BENSON, *Justices Pro Tempore*.

CARBULLIDO, CJ.:

[1] Defendant-Appellant Nathan G. Aguirre appeals from multiple convictions for murder and robbery. Aguirre argues that his right against double jeopardy was violated when he was convicted of aggravated murder during the commission of robbery, the underlying robbery charge, murder committed knowingly and murder committed recklessly, based upon a single act against a single victim. Aguirre also argues that the double jeopardy prohibition was violated by his convictions for more than one count of the special allegation of the use of a deadly weapon in the commission of a felony. Aguirre further argues that the delay of forty-four months between his conviction and sentencing divested the trial court of jurisdiction. Finally, Aguirre argues that his trial counsel rendered ineffective assistance. We affirm Aguirre's convictions for aggravated murder during the commission of a robbery, the separate offense of murder committed knowingly and their corresponding special allegations. We reverse Aguirre's convictions for murder committed recklessly, robbery and their corresponding special allegations. We remand for sentencing on the charge of murder committed knowingly and its special allegation. We hold that the trial court was not divested of jurisdiction because of the forty-four month delay before sentencing. Last, we decline to reach Aguirre's ineffective assistance of counsel claim.

I.

[2] On the night of June 20, 1995, a cab driver, Petronio B. Dagalea, picked up two male passengers from the Duty Free Shoppers store in Tumon, Guam. Dagalea was later found robbed and shot to death in his cab along the road to Two Lovers Point, a popular tourist destination.

[3] On July 24, 1995, Aguirre was indicted on one count of aggravated murder, two counts of first degree murder, and one count of robbery.[1] Aguirre was also charged with a special allegation of possession and use of a deadly weapon in the commission of each of these felonies. Aguirre

[1] Two other individuals were indicted with Aguirre, however, this appeal concerns only Aguirre.

waived his right to a speedy trial allegedly upon the advice of his trial counsel and the case proceeded to trial in July of 1996. On July 12, 1996, the jury found Aguirre guilty on all the charges and special allegations. The trial court scheduled a sentencing hearing for July 26, 1996, but at the request of Aguirre's trial counsel, the sentencing hearing was continued pending a motion for a new trial. Prior to the hearing on the motion for a new trial, Aguirre obtained new counsel. On June 13, 1997, the trial court denied Aguirre's motion for a new trial but did not set a date for the sentencing hearing.

[4] For nearly three years, the case sat dormant. Finally, on February 3, 2000, Aguirre filed a motion to dismiss. Aguirre's counsel then filed a motion for a psychiatric examination. On March 27, 2000, the trial court sentenced Aguirre to life imprisonment without parole for the murder charges and twenty-five years imprisonment for the special allegations, to be served consecutive to the sentence for murder. On May 10, 2000, the trial court denied Aguirre's motion to dismiss.

[5] On April 30, 2002, Aguirre filed another motion to dismiss. On July 25, 2002, the trial court excused Aguirre's counsel and through August 27, 2002, appointed and excused four different attorneys for Aguirre. On September 3, 2002, the trial court appointed Aguirre's present counsel.

[6] On February 21, 2003, the trial court filed its Judgment. On February 24, 2003, the trial court denied Aguirre's motion to dismiss filed on April 30, 2002. Aguirre appealed.

II.

[7] The Supreme Court has jurisdiction over this appeal from a final judgment of the Superior Court. Title 7 GCA § 3107 (2004).

III.

[8] Aguirre argues that the trial court violated his right against double jeopardy by convicting and sentencing him on multiple murder charges based on a single act against a single victim and by failing to dismiss the robbery charge upon the jury's verdict of guilty for the Felony Murder charge. Aguirre also argues that the forty-four month delay between the jury verdict and pronouncement of sentence violated Guam law and divested the trial court of jurisdiction to sentence him. Last,

Aguirre argues that his trial counsel rendered advice and performance so deficient as to constitute ineffective assistance of counsel. We begin with the double jeopardy issues.

A. Double Jeopardy

[9] For the killing and robbery of Dagalea, Aguirre was indicted on three murder charges and one robbery charge as follows: (1) Aggravated Murder (during the commission of robbery) pursuant to section 16.30(a)(2) of Title 9 Guam Code Annotated ("Felony Murder"); (2) Murder pursuant to section 16.40(a)(1) of Title 9 Guam Code Annotated ("Knowing Murder"); (3) Murder pursuant to 16.40(a)(2) of Title 9 Guam Code Annotated ("Reckless Murder"); and (4) First Degree Robbery pursuant to section 40.10 of Title 9 Guam Code Annotated. Aguirre was also charged with a Special Allegation of the possession and use of a deadly weapon in the commission of each of the four charges. The jury found Aguirre guilty of all charges and special allegations.

[10] In its judgment, the trial court stated:

> based on these verdicts, a JUDGMENT OF GUILTY is hereby entered on the charges as contained in the indictment of AGGRAVATED MURDER . . . two counts of MURDER . . . ROBBERY . . . and four counts of the SPECIAL ALLEGATION OF POSSESSION AND USE OF A DEADLY WEAPON IN THE COMMISSION OF A FELONY.

Appellant's Excerpts of Record ("ER"), p. 37 (Judgment). In the trial court's judgment, Aguirre was sentenced as follows:

> for the offense of AGGRAVATED MURDER (As a 1st Degree Felony), and the merged offenses of two counts of MURDER (As a 1st Degree Felony) and ROBBERY (As a 1st Degree Felony), the Defendant is sentenced to life imprisonment at the Department of Corrections, Mangilao, Guam ("DOC"); and that he shall not be eligible for parole, work release or educational programs outside of the confines of the prison, nor shall his sentence be suspended.
>
> for the SPECIAL ALLEGATION OF POSSESSION AND USE OF A DEADLY WEAPON IN THE COMMISSION OF AGGRAVATED MURDER, and three (3) merged counts of SPECIAL ALLEGATION of POSSESSION AND USE OF A DEADLY WEAPON IN THE COMMISSION OF A FELONY, the Defendant is sentenced to serve a period of 25 years imprisonment at DOC, consecutive to the sentence imposed . . . above . . . .

Appellant's ER, p. 37 (Judgment). Thus, the trial court convicted Aguirre on all four charges and all four special allegations. However, for sentencing, the trial court merged the murder and robbery

charges, merged the special allegations, and pronounced one sentence for the murder and robbery charges and one for the special allegations.

[11] Aguirre argues that because the charges against him relate to one act, the multiple convictions and sentences for the murder charges violate his right against double jeopardy. Aguirre also argues that because the elements of robbery are subsumed within the elements of felony murder, the robbery conviction should have been dismissed upon the conviction of felony murder and that the trial court's failure to dismiss the robbery conviction violates his right against double jeopardy. We begin with the issue of whether the multiple convictions violate double jeopardy protections.

1. Multiple Convictions

[12] "A double jeopardy claim is a question of law reviewed de novo." *People v. San Nicolas*, 2001 Guam 4, ¶ 8 (quoting *People v. Florida*, Crim. No. 96-00060A, 1997 WL 209044, at * 6 (D. Guam App. Div. April 21, 1997)).

[13] The Double Jeopardy Clause in the Fifth Amendment of the United States Constitution provides protection against a second prosecution of the same offense after acquittal or conviction, and it protects against multiple punishments for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S. Ct. 2536, 2540 (1984); *see also People v. Palisoc*, 2002 Guam 9, ¶ 35; *San Nicolas*, 2001 Guam 4, ¶ 8. The Double Jeopardy Clause is made applicable in Guam by the Organic Act and Guam's Criminal and Correctional Code. *See People v. Angoco*, 2004 Guam 11, ¶ 17.

[14] In two cases, *People v. Reyes*, 1998 Guam 32, and *People v. San Nicolas*, 1999 Guam 19, this court indicated seemingly inconsistent stances on the issue of multiple convictions. In *Reyes*, the defendant was convicted of two counts of murder and two counts of use of a deadly weapon during the commission of a felony. *Reyes*, 1998 Guam 32 at ¶ 1. All the counts arose from the same offense. *See id.* at ¶¶ 2-3. The trial court pronounced separate sentences for each of the four convictions. *Id.* at ¶ 3. The trial court ordered the sentences for the murders to run concurrently. *Id.* The trial court also ordered the sentences for the use of a deadly weapon counts to run concurrently with each other but consecutive to the murder sentences. *Id.* This court *sua sponte* ruled "[i]f only

a single offense has been committed, though it is charged in different counts, only one sentence may properly be imposed," and found that the sentencing violated the double jeopardy clause, notwithstanding the fact that the sentences were made to run concurrently. *Id.* at ¶ 23 (quoting 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, Federal Practice and Procedure § 527 (2nd ed. 1982)). The *Reyes* court stated: "Appellant should be convicted of one count of murder and one count of Special Allegation, for which he should receive sentencing" and remanded for resentencing. *Id.* (emphasis added).

[15] In dictum, the *San Nicolas* court stated:

> The fact of the matter is that the People often charge out offenses, some of which are already subsumed within others. The People attempt to zealously represent the people of Guam, and in doing so will prosecute defendants for any and all crimes which they believe the evidence supports. In turn, the court has some obligation to ensure LIOs are presented to the jury only if the evidence also supports their inclusion. The effect can cause a defendant to be tried and convicted more than once for essentially the same crime; however, the practical effect of such 'duplicative' convictions is either nullified in sentencing or sentencing is enhanced in some manner, depending upon the situation.

San Nicolas, 1999 Guam 19 at ¶ 51(emphasis added). This opinion seems to indicate that multiple convictions for the same crime may be rendered harmless in sentencing.

[16] The People correctly point out that jurisdictions are divided over the issue of whether multiple convictions for the same offense violate the double jeopardy clause. However, in Guam the question was settled by the Legislature's adoption of section 1.07 of the Model Penal Code, which is codified at section 1.22 of Title 9 Guam Code Annotated.

[17] Section 1.22 provides in part:

> When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> (a) one offense is included in the other as defined in § 105.58 of the Criminal Procedure Code . . . .

Title 9 GCA § 1.22(a) (1996). Under section 105.58(b)(1) of Title 8 GCA, an offense is included when: "It is established by proof of the same or less than all the facts required to establish the

commission of the offense charged . . . ." Title 8 GCA § 105.58(b)(1) (1996).[2] This court's holding in *Reyes* is consistent with section 1.22 and we follow its reasoning.

[18] Under section 1.22 and the *Reyes* opinion, a defendant may be prosecuted for multiple offenses arising from the same conduct if the conduct establishes the commission of more than one offense. However, if the offenses are included offenses, the defendant cannot be convicted of more than one offense. This raises the question of whether the murder charges against Aguirre are "lesser included" offenses.

[19] In *Angoco v. Bitanga*, 2001 Guam 17, this court held that negligent homicide was a lesser included offense of a felony murder charge which was based on criminal negligence. *Id.* at ¶ 13. The court stated:

> the elements of felony aggravated murder are: (1) causing the death of another; (2) either intentionally and with premeditation, intentionally, knowingly, recklessly, or by criminal negligence; and (3) during the commission or attempt to commit a felony. Further, the elements of negligent homicide are: (1) causing the death of another; and (2) by criminal negligence. But for the underlying felony, negligent homicide shares the same elements with felony aggravated murder. If the second element of felony aggravated murder is based on criminal negligence, then negligent homicide would be a lesser-included offense.

Id. (footnote omitted). Under this analysis, the negligent homicide charge requires proof of the "same or less" facts as the felony murder charge and is a lesser included offense. *Id.* (Citing 8 GCA § 105.58). We turn to the question of whether the charges against Aguirre require proof of "the same or less facts."

a. The Murder Charges

[20] In the case at bar, the Felony Murder charge against Aguirre contained the elements of: (1) causing the death of another; (2) by criminal negligence; (3) during a robbery. The Knowing Murder charge contained the elements of: (1) causing the death of another; (2) knowingly. The Reckless

[2] This limitation on convictions for the same offense is similar to the second part of the test announced in *United States v. Blockburger*, 284 U.S. 299, 52 S. Ct. 180 (1932), for whether multiple punishments for the same offense violates Double Jeopardy: "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, 52 S. Ct. at 182. *See People v. San Nicolas*, 2001 Guam 4, ¶ 11.

Murder charge contained the elements of: (1) causing the death of another; (2) recklessly, under circumstances manifesting extreme indifference to the value of human life. All three charges contained the element of causing the death of another but with different mental states.

> If the definition of a crime prescribes criminal negligence as the culpable mental state, it is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts intentionally.

Title 9 GCA § 4.35 (1993).

[21] With respect to the Knowing Murder and Reckless Murder charges, under section 4.35, recklessness is established by showing that a person acts knowingly. Thus, Reckless Murder has the "same or less" elements of Knowing Murder and is a lesser included offense thereof. *See* 8 GCA § 105.58; 9 GCA § 1.22; *see also People v. Green*, 437 N.E.2d 1146, 1150 (N.Y. 1982) ("The rule that where the elements of the lesser offense (i.e., result and underlying conduct) are identical with the requisite elements of the greater crime and the only thing that differs between the two crimes is the culpable mental states, the . . . definition of 'lesser included offense' is nevertheless satisfied since the lower forms of mental culpability are necessarily subsumed within the higher mental states."); *State v. Braxton*, 750 A.2d 185, 187 (N.J. Super. Ct. App. Div. 2000) (stating that for a crime to be a lesser included offense, it must either be established by proof of the same or less than all the facts used to establish the greater charge or a lower degree of culpability of the defendant). Because Reckless Murder is a lesser included offense of Knowing Murder, the trial court should have dismissed the jury's verdict of guilty for the Reckless Murder charge. Accordingly, we hold that the trial court erred in convicting Aguirre of Reckless Murder.

[22] However, with respect to whether Knowing Murder is a lesser included offense of Felony Murder, the result is different. The element of causing the death of another in the Felony Murder charge was based explicitly on criminal negligence, which is a lower mental state than the Knowing Murder charge. The jury was specifically instructed by the trial court that with respect to Felony Murder, the prosecution must prove the essential element of criminal negligence. Transcript ("TR")

vol. V of V, p. 100 (Jury Trial, July 11, 1996). In addition, the jury verdict form identified the offense of Felony Murder as it was "charged in Charge 1." Record on Appeal ("RA") tab 133.1 (Verdict Form 1A). Thus, the Felony Murder charge given to the jury was exactly the charge specified in the indictment. Returning a verdict of guilty, the jury found that the Felony Murder was committed with criminal negligence.

[23] The proof of criminal negligence in the Felony Murder charge does not satisfy proof of the higher mental state of "knowingly." *See Green*, 437 N.E.2d at 1150. Moreover, the Felony Murder charge contains the additional element of robbery. Thus, the Knowing Murder charge does not have the "same or less" facts as the Felony Murder charge and thus, is not a lesser included offense thereof. *See* 8 GCA § 105.58; 9 GCA § 1.22. We hold that the Felony Murder and Knowing Murder charges are separate offenses and the convictions of each and the convictions on their respective special allegation charges shall stand.[3]

b. The Robbery Charge

[24] The Felony Murder charge in the indictment states in part:

> On or about the 20th day of June, 1995 . . . NATHAN GEORGE AGUIRRE . . . with criminal negligence, caused the death of . . PETRONIO P. DAGALEA, during the commission of Robbery (as alleged in the fourth charge below).

Appellant's ER, pp. 1-2 (Indictment) (emphasis added). The Fourth Charge against Aguirre was for the intentional infliction of serious bodily injury in the course of committing theft, in violation of section 40.10 of Title 9 GCA. The Felony Murder charge expressly referred to the Fourth Charge of Robbery to describe its underlying felony. Therefore, the Fourth Charge, Robbery, had the "same or less" elements as the Felony Murder charge and was explicitly made a lesser included offense thereof. *See* 8 GCA § 105.58; 9 GCA § 1.22. A conviction for robbery is thus prohibited by section 1.22 of Title 9 Guam Code Annotated, and the trial court should have dismissed the jury's verdict of guilty on the robbery charge and its corresponding Special Allegation. Accordingly, we hold that

[3] We note that proper jury verdict forms may prevent violations of section 1.22 of Title 9 Guam Code Annotated by instructing the jury to consider lesser included offenses only if the defendant is found not guilty of the greater offense or if the jury cannot unanimously agree that the defendant is guilty. This requires that the lesser included offenses be correctly identified.

the trial court erred in convicting Aguirre of the Robbery charge and its corresponding Special Allegation.

2. Multiple Sentences

[25] Citing this court's opinion in *Reyes*, 1998 Guam 32, Aguirre argues that he cannot receive multiple sentences because the charges were based on only one offense and that only one sentence can properly be imposed. We held above that the Felony Murder and Knowing Murder charges are separate offenses and affirmed the convictions for both. Because they were separate offenses, the holding in the *Reyes* case is not applicable. Moreover, both Felony Murder and Knowing Murder contain different mandatory statutory sentences. The sentence for Felony Murder, life imprisonment without parole, is provided by section 16.30 of Title 9 Guam Code Annotated. The sentence for Knowing Murder, life imprisonment with the possibility of parole, is provided by section 16.40 of Title 9 Guam Code Annotated. Thus, Aguirre should have been sentenced separately for both Felony Murder and Knowing Murder. We hold that the trial court erred in issuing a single sentence for both the Felony Murder and Knowing Murder charges. We remand for sentencing consistent with this holding.

B. The Forty-four Month Delay

[26] Aguirre was found guilty by the jury on July 12, 1996. The trial court pronounced Aguirre's sentence on March 27, 2000. Aguirre argues that this forty-four month delay violates section 120.14 of Title 8 Guam Code Annotated and divests the trial court of jurisdiction. Issues of jurisdiction are reviewed de novo. *People v. Quichocho*, 1997 Guam 13, ¶ 3.

[27] Section 120.14 provides the time for the trial court to pronounce judgment after a jury has reached a verdict of guilty as follows:

> **Judgment of Guilty: Time for Sentencing; Extensions.**
>
> (a) After a plea, finding or verdict of guilty against the defendant, the court shall order his detention or release as provided by § 40.85 and shall appoint a time for pronouncing judgment, which must be within 21 days after the plea, finding or verdict.
>
> (b) Notwithstanding Subsection (a), the court may extend the period provided in Subsection (a);

> (1) Not more than 10 days for the purpose of hearing or determining any motion for a new trial or in arrest of judgment . . . .

Title 8 GCA § 120.14 (2004).

[28] This court recently held that a trial court's failure to comply with section 120.14 is a procedural rather than a jurisdictional defect. *People v. Hall*, 2004 Guam 12, ¶ 18. This court therein adopted the standard that a judgment in violation of section 120.14 will not be reversed unless the delay results in a miscarriage of justice. *Id.* n.2. Thus, in the instant case, even if the trial court violated section 120.14, jurisdiction is not divested. The question is whether Aguirre suffered a miscarriage of justice in the delay of his sentencing.

[29] "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *People v. Watson*, 299 P.2d 243, 254 (Cal. 1956).

[30] Aguirre concedes that the trial court calendared a sentencing date for July 26, 1996, but that this date was reset to August 23, 1996 pursuant to a request of his counsel at that time. Appellant's Opening Brief, p. 16. Aguirre further concedes that these dates comport with the requirements of section 120.14 and that the various post-trial motions were filed on his behalf. The Docket Sheet indicates that Aguirre requested an extension of time to file a motion for a new trial on July 15, 1996 which was filed on September 11, 1996. Appellant's ER, pp. 53-54 (Docket Sheet). Prior to the hearing on the motion for a new trial on December 6, 1996, Aguirre replaced his counsel and filed at least two other continuances. Appellant's ER, pp. 54-55 (Docket Sheet). Thus, the initial delay in sentencing was caused solely by Aguirre.[4]

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[4] We note that section 120.14(b)(1) of Title 9 Guam Code Annotated provides up to a ten day extension for the determination of a motion for a new trial and that the trial court's extension to August 23, 1996 at Aguirre's request was within the maximum of thirty-one days from the jury's verdict. The Docket Sheet shows two notices of rescheduled hearing pushing the hearing date first to September 18, 1996 and then to September 30, 1996. It also shows that Aguirre filed his motion for a new trial on September 11, 1996, which was well beyond the time limit set forth in section 120.14. However, this delay was caused solely by Aguirre himself and he suffered no prejudice from it.

[31] From the trial court's denial of Aguirre's motion for a new trial on June 13, 1997 to the trial court's pronouncement of sentence on March 27, 2000, the only significant action in Aguirre's case was a motion to dismiss filed on February 3, 2000. This delay of nearly three years is troubling. The issue of whether Aguirre suffered a miscarriage of justice, is determined by inquiring whether absent this delay, "it is reasonably probable that a result more favorable to [Aguirre] would have been reached." *See Watson*, 299 P.2d at 254. Although the delay of nearly three years is troubling, we find it would not have affected the outcome or the result.

[32] We recognize that "[o]nce a person has been criminally charged and prosecuted, a burden rests upon the prosecutor and the court to conclude the proceedings . . . . [T]he initiative rests with the court and the prosecution, not the defendant." *People v. Drake*, 462 N.E.2d 376, 377 (N.Y. 1984). However, we cannot ignore the fact that the initial delay was caused by Aguirre himself by filing his motion for a new trial. While this does not divest the trial court and prosecution of its duty to conclude the proceedings, it is difficult to comprehend why Aguirre's counsel did not attempt to set aside the verdicts after the denial of the motion for a new trial by appeal or other means during the three years of inactivity. Commensurate with the obligation of the trial court and the prosecution to conclude the case is the duty of Aguirre's counsel to "make reasonable efforts to expedite litigation consistent with the interests of the client." GUAM R. OF PROF. CONDUCT 3.2 (1994).[5]

[33] Moreover, we cannot lose sight of the fact that Aguirre was found guilty of Felony Murder which carries a mandatory sentence of life imprisonment without parole. Thus, it is likely that Aguirre would in any case have remained confined pending post-trial litigation or appeal.

[34] Therefore, we hold that Aguirre did not suffer a miscarriage of justice by the nearly three-year delay caused by the inaction of the trial court, the prosecution and his own counsel and that the trial court's sentence which violates section 120.14 of Title 9 Guam Code Annotated will not be reversed.

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[5] Though we do not suggest it occurred in the instant case, the facts here demonstrate the possibility that a defendant working with his lawyer can take advantage of a trial court's inadvertent failure to timely sentence, not inform the court or move to expedite the case, and bide his or her time until a motion to dismiss for failure to comply with section 120.14 of Title 9 Guam Code Annotated can be filed.

C. Ineffective Assistance of Counsel

[35] Whether Aguirre received ineffective assistance of counsel is a mixed question of law and fact and review is de novo. *Angoco*, 2001Guam 17 at ¶ 7. We note that Aguirre raised the issue of ineffective assistance in his motion to dismiss, but the trial court did not consider this issue stating it should be brought before the appellate level pursuant to section 130.10 of Title 8 Guam Code Annotated. Appellant's ER, p. 41 (Decision and Order). The trial court misinterpreted section 130.10 which states "[a]n appeal may be taken in any criminal action in which the offense charged is not a violation." Title 8 GCA § 130.10 (1996). A claim of ineffective assistance of counsel is not an offense charged in a criminal action, it is a claim of error in the trial proceedings. *See Angoco*, 2004 Guam 11 at ¶ 21.

[36] While an ineffective assistance of counsel claim may be heard on direct appeal, this court has previously held that it is more properly brought as a writ of habeas corpus because it requires an evidentiary inquiry beyond the official record. *People v. Ueki*, 1999 Guam 4, ¶ 5. The court has, however, reviewed such claims if the record is sufficiently complete to make a proper finding. *See People v. Root*, 1999 Guam 25 ¶ 14.

[37] Although Aguirre alleges several specific instances of deficiencies of his trial counsel, the most serious allegation concerns his waiver of the right to a speedy trial on the advice of his trial counsel on the basis "that the Government was unable to locate a 'key witness' necessary for the prosecution of the case against him." Appellant's Opening Brief, p. 5. The only evidence in the record to support this allegation is Aguirre's Declaration filed on October 24, 2002 in support of his motion to dismiss. Appellant's ER, p. 34-35 (Decl. of Nathan Aguirre). Aguirre was not subject to questioning by the prosecution and his trial counsel has not had the opportunity to refute Aguirre's allegations. We find the record is not sufficient to make a proper finding on the issue of ineffective assistance of counsel. Thus, we decline to reach this issue. *See People v. Hall*, 2004 Guam 12, ¶¶ 42-42.

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IV.

[38] Aguirre was convicted of multiple counts of murder, robbery and special allegations based on a single act. We find that the Reckless Murder charge is a lesser included offense of Knowing Murder and that the Robbery charge is a lesser included offense of the Felony Murder charge which was based on robbery. Thus, we hold the trial court erred in convicting Aguirre of Reckless Murder and Robbery and their respective special allegations. Accordingly, we **REVERSE** Aguirre's convictions for Reckless Murder and Robbery and the accompanying special allegations. However, we find that the Knowing Murder charge is not a lesser included offense of the Felony Murder charge, which was specifically based on the lower mental state of criminal negligence, and therefore **AFFIRM** Aguirre's convictions for Felony Murder, Knowing Murder and their respective special allegations. With respect to sentencing, we **AFFIRM** the Aguirre's sentence for the Felony Murder charge and its special allegation. However, we find that the trial court erred in not sentencing Aguirre for the separate offense of Knowing Murder charge and its special allegation and remand for sentencing thereon.

[39] We find that the forty-four month delay between the jury's verdict and Aguirre's sentencing violated section 120.14 of Title 9 Guam Code Annotated requiring sentencing within twenty-one days of the verdict. However, we hold that this violation does not rise to a miscarriage of justice. Thus, we will not disturb Aguirre's sentence on this ground. Finally, we decline to reach the issue of ineffective assistance of counsel, which is more appropriate for review in a petition for writ of habeas corpus.

[40] The trial court's judgment is hereby **AFFIRMED** in part and **REVERSED** in part, and the matter is **REMANDED** for proceedings consistent with this opinion.