

NO. 21674

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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GREGORY BARNETT, Petitioner-Appellant,

vs.

STATE OF HAWAI'I AND HAWAI'I PAROLING AUTHORITY,  
Respondents-Appellees.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(S.P.P. 97-0015)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.,  
and Circuit Judge Blondin, in place of Acoba, J., recused)

Petitioner-appellant Gregory Barnett appeals from the December 7, 1999 Memorandum Opinion of the Intermediate Court of Appeals (ICA) affirming the circuit court's April 27, 1998 Amended Findings of Fact, Conclusions of Law and Order Denying Barnett's Petition for Post-Conviction Relief filed December 30, 1997. In his application for certiorari, Barnett contends that the ICA erred in concluding that: (1) Barnett's motion for relief from judgment in a prior Hawai'i Rules of Penal Procedure (HRPP) Rule 40<sup>1</sup> case was the equivalent of an amended petition, thus

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<sup>1</sup> HRPP Rule 40 provides:

RULE 40. POST-CONVICTION PROCEEDING

(a) Proceedings and Grounds. The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability

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<sup>1</sup>(...continued)

of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:

(1) From Judgment. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i;

. . . .

(iii) that the sentence is illegal;

. . . .

(2) From Custody. Any person may seek relief under the procedure set forth in this rule from custody based upon a judgment of conviction, on the following grounds:

(i) that sentence was fully served;

(ii) that parole or probation was unlawfully revoked;  
or

(iii) any other ground making the custody, though not the judgment, illegal.

(3) Inapplicability. Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. Except for a claim of illegal sentence, an issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

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(f) Hearings. If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may

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barring a subsequent HRPP Rule 40 petition; (2) Hawai'i Revised Statutes (HRS) did not mandate that vacancies on the Hawai'i Paroling Authority (HPA) board be filled; and (3) a judge's refusal to file court documents in prior proceedings was not an extraordinary circumstance justifying a failure to raise the issues in a prior proceeding.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows: (1) the ICA did not gravely err by concluding that Barnett's claim that his custody was illegal based upon a 1996 amendment to HRS § 706-669 was previously ruled upon, see Barnett v. State, 91 Hawai'i 20, 979 P.2d 1046 (1999); (2) the ICA did

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<sup>1</sup>(...continued)

deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition or at any later proceeding.

The petitioner shall have a full and fair evidentiary hearing on the petition. The court shall receive all evidence that is relevant and necessary to determine the petition, including affidavits, depositions, oral testimony, certificate of any judge who presided at any hearing during the course of the proceedings which led to the judgment or custody which is the subject of the petition, and relevant and necessary portions of transcripts of prior proceedings. The petitioner shall have a right to be present at any evidentiary hearing at which a material question of fact is litigated.

. . . .

not gravely err by concluding that the parole board can operate with a vacancy as long as a majority of the members act, see HRS § 353-62(b)(4); (3) the ICA erred by concluding that Barnett failed to allege extraordinary circumstances justifying his failure to file documents in a prior proceeding, but assuming arguendo that extraordinary circumstances were shown to exist, the error was harmless because the claims of Barnett that the parole board cannot operate with a vacancy are without merit, as held in paragraph (2) above.

Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, December 3, 2003.

On the briefs:

Gregory Barnett,  
petitioner-appellant  
pro se

Arleen Y. Watanabe,  
Deputy Prosecuting Attorney,  
for respondent-appellee  
State of Hawai'i