

NO. 22794

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

DAVID WOODARD, Petitioner-Appellant

vs.

STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P.P. NO. 98-0033 (CR. NO. 94-2068))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Petitioner-appellant David Woodard appeals from the findings of fact, conclusions of law, and order of the Circuit Court of the First Circuit, the Honorable Richard Perkins presiding, denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief. Woodard argues that the circuit court erred in denying his petition because his rights under HRPP Rule 48 were violated and, therefore, that his trial counsel and appellate counsel rendered constitutionally ineffective assistance by failing to raise the HRPP Rule 48 issue properly. The prosecution counterargues that the issues raised in Woodard's petition were previously ruled upon or waived and, even if they were not, that there was no HRPP Rule 48 violation and Woodard's attorneys were not ineffective.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments made and the issues raised by the parties, we

resolve the parties' arguments as follows: 1) Woodard's HRPP Rule 48 argument was not previously ruled upon or waived because the issue was not properly preserved for appeal and was not properly raised in the direct appeal; 2) Woodard's ineffective assistance of counsel argument was not previously ruled upon and was not waived because Woodard did not have a realistic opportunity to raise the issue prior to the HRPP Rule 40 petition; see Matsuo v. State, 70 Haw. 573, 577, 778 P.2d 332, 334 (1989); 3) the circuit court did not err in concluding that Woodard's HRPP Rule 48 rights had not been violated because a) the forty-six day period from the filing of the public defender's motion to withdraw to the appointment of new counsel was excludable under HRPP Rule 48(d)(1) and (c)(1), b) there is nothing in the record on appeal that indicates that the circuit court granted a defense continuance with the express instruction that the period would not be counted against Woodard and further, the court was without authority to do so, see HRPP Rule 48(c) ("[t]he following periods shall be excluded" (emphasis added)), and c) even assuming arguendo that the circuit court improperly excluded the one day period between October 9 and 10, 1995, less than 180 non-excludable days elapsed before the start of trial; and 4) because Woodard's HRPP Rule 48 rights were not violated, neither trial counsel nor appellate counsel rendered ineffective assistance by failing to raise the issue properly.

All other arguments raised by Woodard are also without merit.

THEREFORE, IT IS HEREBY ORDERED that the circuit court's order denying the petition for post-conviction relief is affirmed.

DATED: Honolulu, Hawai'i, September 24, 2001.

On the briefs:

Arthur E. Ross for
petitioner-appellant

Donn Fudo, Deputy
Prosecuting Attorney,
for respondent-appellee