

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 23545

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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BRYANT WHITBY, JR., Petitioner-Appellant

vs.

STATE OF HAWAI'I, Respondent-Appellee  
(NO. 23545 (S.P.P. NO. 99-0001(2)))

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

BRYANT WHITBY, JR., Defendant-Appellant.  
(NO. 23900 (CR. NO. 99-0435(2)))

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APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(Cr. No. 95-0435(2) and S.P.P. No. 99-0001(2))

SUMMARY DISPOSITION ORDER

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

The petitioner-appellant/defendant-appellant Bryant Whitby, Jr. appeals from the findings of fact (FOFs), conclusions of law (COLs), and order of the circuit court of the second circuit, the Honorable Shackley F. Raffetto presiding, filed on May 16, 2000, summarily denying the petition for post-conviction relief, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2000) [hereinafter, "Rule 40 petition"] and from the order of the second circuit court, the Honorable Shackley F. Raffetto also presiding, filed on November 13, 2000, denying Whitby's motion for correction of illegal sentence, pursuant to HRPP Rule 35 (2000) [hereinafter, "Rule 35 motion"]. On appeal, Whitby contends: (1) that the trial court committed plain error by

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submitting erroneous and misleading instructions to the jury; (2) that the circuit court erred in entering an order denying his Rule 40 petition, inasmuch as (a) he was denied effective assistance of counsel at trial, on appeal, and during special proceedings, in violation of his rights under article I, section 14 of the Hawai'i State Constitution and the sixth amendment to the United States Constitution, and that his claims on appeal were not waived, pursuant to this court's decision in Briones v. State, 74 Haw. 442, 462, 848 P.2d 966, 986 (1993), because "no realistic opportunity existed to raise the issue on direct appeal" and (b) the circuit court, at the hearing on the motion for reduction of sentence, erred in failing to sua sponte hold a re-sentencing hearing subsequent to this court's summary disposition order (SDO) in State v. Bryant Whitby, No. 20457, which vacated thirty-six of forty-one counts against him, because this court's SDO "essentially nullified" the basis for the sentencing court's imposition of an extended term sentence; and (3) that the circuit court erred in entering an order denying his Rule 35 motion, inasmuch as the sentencing court (a) failed to make the requisite findings necessary to impose upon him an extended life term sentence and (b) erred when it enhanced his sentence based upon aggravating factors not established by the evidence, namely, (i) the thirty-six counts later vacated by this court, (ii) the "handicapped status" of the complainant, and (iii) possible prior conduct.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to

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the arguments advanced and the issues raised, we resolve Whitby's appeal as follows: (1) Whitby may not raise on appeal the claim that jury instructions were erroneous or misleading, inasmuch as he failed to specify this allegation as a ground for relief in his Rule 40 petition, see HRPP Rule 40(a)(3); Stanley v. State, 76 Hawai'i 446, 879 P.2d 551 (1994); (2) the circuit court did not err in denying Whitby's Rule 40 petition, inasmuch as (a) Whitby failed to satisfy his burden of demonstrating that "specific errors or omissions resulted in the withdrawal or substantial impairment of a meritorious defense," State v. Poaipuni, 98 Hawai'i 387, 392, 49 P.3d 353, 358 (2002), he has not shown that his trial, appellate, and special proceedings counsel provided ineffective assistance and (b) the circuit court on the motion for reduction of sentence did not commit plain error in failing sua sponte to hold a resentencing hearing following this court's SDO vacating thirty-six counts of Whitby's conviction, because the circuit court concluded that "[n]othing of import changed for the court to rule any differently after five Class 'A' felonies were affirmed on appeal," and Whitby's "substantial rights" were therefore not affected, see HRPP Rule 52(b) (1993); and (3) the circuit court did not err in denying Whitby's Rule 35 motion, inasmuch as (a) the sentencing court did not fail to make the requisite findings necessary to impose upon Whitby an extended life term sentence, because it expressly ruled on the record that Whitby was a multiple offender and that his commitment for an extended term was necessary for the protection of the public, and the sentencing court did not "clearly [exceed]

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the bounds of reason or [disregard] rules or principles of law or practice to the substantial detriment of" Whitby, see State v. Okumura, 78 Hawai'i 383, 894 P.2d 80 (1995); State v. Huelsman, 60 Haw. 71, 588 P.2d 394 (1979); State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003), and (b) the sentencing court did not impose an extended life term sentence based upon aggravating factors not in evidence, see Kaua, 102 Hawai'i at 13, 72 P.3d at 485 (holding that assessment of criminal defendant's status as "multiple offender," requisite to imposition of extended term of imprisonment pursuant to HRS § 706-662(4), is determined by sentencing court, because the requisite findings entail "historical facts" that are "extrinsic" to circumstances underlying charged offense). Therefore,

IT IS HEREBY ORDERED that the findings of fact, conclusions of law, and orders from which the appeal is taken are affirmed.

DATED: Honolulu, Hawai'i, May 18, 2004.

On the briefs:

Jock M. Yamaguchi, for  
the defendant-petitioner  
appellant Bryant Whitby, Jr.

Simone C. Polak, deputy  
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the plaintiff-respondent-  
appellee State of Hawai'i