***** NOT FOR PUBLICATION *****

NO. 25721

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

RONALD ANDREW PONG KEE JHUN, Petitioner-Appellant,

vs.

STATE OF HAWAI'I, Respondent-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P.P. NO 00-1-0026)
(CR. NO. 37522)

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

In 1967, following a jury-waived trial, petitioner-appellant Ronald A. Jhun was convicted of and sentenced for one count of burglary in the second degree, in violation of Revised Laws of Hawai'i § 266 (1955). Jhun appeals from the first circuit court's February 24, 2003 decision and order denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2000) petition.[1] On appeal, Jhun's sole contention is that, inasmuch as "[his] waiver of jury trial was not knowing and intelligent under federal law[,]" his conviction was obtained in violation of the sixth amendment to the United States Constitution.

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

[1] The Honorable Richard K. Perkins presided over Jhun's Rule 40 petition.

advanced and the issues raised by the parties, we resolve Jhun's contention as follows. Jhun did not take a direct appeal from his conviction or sentence. Jhun, therefore, raised the issue of the effectiveness of his waiver of a jury trial for the first time, collaterally, in an unrelated appeal to the Ninth Circuit Court of Appeals, more than 25 years after his trial and conviction in the underlying criminal case. See United States v. Jhun, 46 F.3d 1147, 1995 WL 7509 at *1 (9th Cir. 1995) (unpublished opinion). Inasmuch as (1) Jhun could have raised the issue before trial or on direct appeal and (2) the record fails to reflect any "extraordinary circumstances to justify [his] failure to raise the issue[,]" HRPP Rule 40(a)(3), or that his failure to the raise the issue was nothing other than knowing and understanding, we hold that the issue is waived. HRPP Rule 40(a)(3); see Stanley v. State, 76 Hawai'i 446, 451, 879 P.2d 551, 556 (1994).

Even addressing the issue, Jhun's claim lacks merit. Initially, we point out that Jhun concedes that his waiver of a jury trial was valid based on Hawai'i law applicable at the time of his conviction in 1967. As framed by Jhun, therefore, the determinative issue before this court is whether his waiver of the right to jury trial was effective based on prevailing federal law in 1967, specifically, the United States Supreme Court's decisions in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and Von Moltke v. Gillies, 332 U.S. 506 (1962). However, both Johnson and Von Moltke ultimately dealt with the validity of a

defendant's waiver of the right to counsel and did not address the standard for determining the effectiveness of a defendant's waiver of jury trial. Jhun's reliance upon these decisions is, therefore, misplaced.

As pointed out in the circuit court's February 24, 2003 decision and order, the applicable standard for waiving the right to jury trial is set forth in Patton v. United States, 281 U.S. 276, 312 (1930):

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. . . .

(Emphasis added.) The determination of whether a right has been intelligently waived must depend upon a survey of the particular facts and circumstances surrounding the individual case, including the background, experience, and conduct of the accused. Johnson, 304 U.S. at 466.

Based on the record and applicable law in 1967, we hold that Jhun expressly and intelligently consented to the waiver of the right to jury trial. First, it is undisputed that, at the May 26, 1967 arraignment and plea hearing, Jhun, who was represented by counsel, personally "demanded a jury-waived trial." Jhun, therefore, plainly and expressly consented to the waiver of a jury trial. Second, the very words used by Jhun himself -- to wit, a "jury-waived trial" -- belie Jhun's contention that he was not informed of the right to jury trial.

Third, it is well settled that, "where it appears from the record that a defendant has waived a constitutional right, the defendant carries the burden of proof to show otherwise by a preponderance of the evidence." State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993). Inasmuch as the minutes from the May 26, 1967 arraignment and plea hearing reflect that Jhun waived the right to jury trial, Jhun was charged with the burden of proof regarding his petition. Apart from his claim that he was not aware of the right to jury trial, Jhun failed to introduce any other evidence to support that his waiver was nothing other than expressly and intelligently made. Accordingly, we hold that Jhun failed to carry the burden of proof and his waiver of the right to jury trial was valid. Therefore,

IT IS HEREBY ORDERED that the circuit court's February 24, 2003 decision and order denying Jhun's Rule 40 petition is affirmed.

DATED: Honolulu, Hawai'i, May 14, 2004.

On the briefs:

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for petitioner-appellant

Alexa D. M. Fujise,
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