***** NOT FOR PUBLICATION *****

NO. 25933

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

DAVID C. PARKER, JR. Petitioner-Appellant,

vs.

STATE OF HAWAIʻI, Respondent-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P.P. NO. 03-1-0008)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.;
with Acoba, J., concurring separately and dissenting)

I. BACKGROUND

Petitioner-appellant David C. Parker, Jr. appeals from the first circuit court's June 10, 2003 order denying Parker's Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief.[1] On appeal, Parker contends that the circuit court erred by dismissing his petition as frivolous. Specifically, Parker argues that: (1) his appellate counsel was ineffective because counsel neither raised the trial counsel's failure to request a pre-sentence mental examination pursuant to Hawaiʻi Revised Statutes (HRS) § 706-603 (1993 & Supp. 2003) nor raised the circuit court's failure, in the underlying criminal proceedings, to order a pre-sentence mental examination sua sponte; (2) HRS § 706-668.5 (1993) is unconstitutional because it "fails to ensure state and federal due process

[1] The Honorable Dan T. Kochi presided over this matter.

protection"; and (3) the thirty-five year minimum term sentence for attempted murder in the second degree imposed by the Hawai'i Paroling Authority (HPA) violated Parker's constitutional right to equal protection.

II. DISCUSSION

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 that the circuit court did not err in denying Parker's petition.

A. Ineffective Assistance Of Appellate Counsel.

Parker's argument regarding ineffective assistance of appellate counsel is without merit. Even if Parker's appellate counsel had raised this argument, neither HRS § 706-606 (1993) nor HRS § 706-603 requires a sentencing court to order a pre-sentence mental examination. Additionally, Parker has neither cited to anything in the record nor advanced specific evidence suggesting that such a mental examination would provide a meritorious defense. See Barnett v. State, 91 Hawai'i 20, 27, 979 P.2d 1046, 1053 (1999) (stating that "the defendant has the burden of establishing ineffective assistance of counsel and must [prove] . . . the withdrawal or substantial impairment of a potentially meritorious defense" (quoting State v. Fukusaku, 85 Hawai'i 462, 480, 946 P.2d 32, 50 (1997)) (block quote formatting omitted)).

B. Constitutionality Of HRS § 706-668.5.

Parker's argument that HRS § 706-668.5 is unconstitutional is without merit. HRS § 706-668.5, the consecutive sentencing statute, mandates that a court's determination of whether to impose concurrent or consecutive terms of imprisonment be made with due consideration of the factors outlined in HRS § 706-606. Therefore, HRS § 706-668.5 does not allow an overbroad or arbitrary exercise of sentencing discretion and is not facially unconstitutional. In the instant case, the sentencing court made several findings indicating that it considered the factors in HRS § 706-606, including the need to protect the public. Therefore, the sentencing judge's determination was not arbitrary such that HRS § 706-668.5 is not unconstitutional as applied to Parker.

C. Hawai‘i Paroling Authority's Minimum Sentence.

We hold that the HPA did not abuse its discretion in setting a thirty-five year minimum term sentence for attempted murder. In setting a minimum term of imprisonment, the HPA examines two factors: (1) the maximum term imposed by the court and (2) the "level of punishment" as determined by HPA. See Hawai‘i Paroling Authority, State of Hawai‘i, Guidelines For Establishing Minimum Terms Of Imprisonment 2 (1989). There are three levels of punishment -- Level I, Level II, and Level III -- and the HPA determines the level of punishment by examining,

inter alia, the nature of the offense, the degree of injury/loss to person or property, and the offender's criminal history. Id. at 1, 3-8.

In the case of an individual convicted of attempted second degree murder (carrying a corresponding sentence of life with the possibility of parole), the HPA guidelines provide that an offender deemed to be at Level I (i.e., the offender "displayed a disregard for the safety and welfare of others" and the injury suffered by the victim "was less than th[at] experienced by similarly situated victims") will receive a minimum term of five to ten years of imprisonment. Id. at 2-3. However, an offender deemed to be at Level III (i.e., the offender "displayed a callous and/or cruel disregard for the safety and welfare of others" and the injury suffered by the victim "was **more** than th[at] experienced by similarly situated victims") will receive a minimum term of twenty to fifty years. Id. at 5-6. Thus, the HPA has discretion to set the minimum term of imprisonment from as little as five years to as much as fifty years; the HPA can deviate from these guidelines, but must explain this deviation in writing. Id. at 5-6.

In the instant case, the HPA imposed a minimum sentence of thirty-five years' imprisonment for Parker's attempted second degree murder conviction -- well within the range of twenty to fifty years imprisonment for a Level III offender. Had the HPA

imposed a minimum sentence of less than five years or greater than fifty years, a written explanation would be required. However, the HPA was not required to explain its minimum term of imprisonment in writing, as the sentence imposed was within the guidelines.

Additionally, the fact that HPA placed all other offenders convicted of attempted second degree murder in the 1993-1994 fiscal year in Level II, rather than Level III, is irrelevant. As we stated in Williamson v. Hawai‘i Paroling Authority, 97 Hawai‘i 183, 189, 35 P.3d 210, 216 (2001), "[t]he legislature apparently intended to grant the HPA broad discretion in establishing minimum terms. As noted in the Commentary on HRS § 706-669, the HPA has the 'exclusive authority to determine the minimum time which must be served before the prisoner will be eligible for parole.'" In other words, the HPA has broad discretion in determining whether to categorize an offender as a Level I, Level II, or Level III offender. In the instant case, Parker was not "similarly situated" as the other individuals convicted of attempted second degree murder in the 1993-1994 fiscal year because Parker was the only offender who also committed second degree murder. See Guidelines For Establishing Minimum Terms Of Imprisonment at 1. The HPA undoubtedly considered the heinous nature of Parker's attempted second degree murder, as well as the fact that he was convicted of second

degree murder in addition to attempted second degree murder, in classifying Parker as a Level III offender.

Given that the thirty-five year minimum sentence imposed by the HPA was within the five to fifty year range established by the HPA's guidelines, the HPA did not abuse its discretion in making this determination.

III. CONCLUSION

Parker has presented no colorable claim entitling him to a hearing on his HRPP Rule 40 petition. Therefore,

IT IS HEREBY ORDERED that the circuit court's June 10, 2003 order denying Parker's HRPP Rule 40 petition for post-conviction relief is affirmed.

DATED: Honolulu, Hawai‘i, August 31, 2004.

On the briefs:

David C. Parker, Jr.,
petitioner-appellant,
pro se

Mark Yuen,
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State of Hawai‘i