

NO. 22634

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

REYNALDO VALDEZ MAGBUAL, Petitioner-Appellant

v.

STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(S.P.P. NO. 97-002)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe, and Lim, JJ.)

Petitioner-Appellant Reynaldo Valdez Magbual (Magbual) appeals the May 28, 1999 order of the Circuit Court of the Third Circuit (the circuit court) that summarily denied his Hawai'i Rules of Penal Procedure (HRPP) Rule 40^{1/} petition (Rule 40

^{1/} Hawai'i Rules of Penal Procedure (HRPP) Rule 40 provides, in relevant part, as follows:

(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 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;

(ii) that the court which rendered the judgment was

(continued...)

Petition) without an evidentiary hearing. We conclude that Magbual's Rule 40 Petition presented a colorable claim for ineffective assistance of counsel and should not have been summarily denied. Accordingly, we vacate the May 28, 1999 order and remand this case to the circuit court so that an evidentiary hearing may be conducted.

^{1/}(...continued)

without jurisdiction over the person or the subject matter;

(iii) that the sentence is illegal;

(iv) that there is newly discovered evidence;

or

(v) any ground which is a basis for collateral attack on the judgment.

. . . .

(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. 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.

BACKGROUND

As a result of conduct that resulted in his impregnation of a twelve-year-old girl (Girl), Magbual was charged in 1992 with Sexual Assault in the First Degree.^{2/} The relationship between Magbual and Girl was a consensual one, and Magbual eventually pled no contest to the reduced charge of Sexual Assault in the Second Degree and was sentenced to probation. Among the special terms and conditions of Magbual's probation were that he "not . . . contact [Girl] nor any member of her immediate family" and that he serve a one-year period of imprisonment.

Probation officer Bert Jung (Jung) testified that he reviewed the terms and conditions of probation with Magbual on June 29, 1993 and gave Magbual a written copy of these terms and conditions. However, a "whole series of events . . . happened" in which Girl approached Magbual and wouldn't leave. For example, Jung said, there "was an incident where [Girl] went over to [Magbual's] house and stayed there for a prolonged period, . . . and he couldn't get her out of the house[.]"

^{2/} The record on appeal does not contain any record of the underlying sexual assault proceedings (Criminal No. 92-314) against Petitioner-Appellant Reynaldo Valdez Magbual (Magbual) except for the transcripts of the hearing on the motion to revoke Magbual's probation sentence. Therefore, any background information regarding the underlying criminal case is derived from the transcripts of the probation revocation proceeding and the record of the proceedings filed by Magbual pursuant to HRPP Rule 40 which spawned this appeal.

Jung testified that he suggested that Magbual obtain a temporary restraining order (TRO) against Girl, but Magbual "didn't want to initiate it. He said if [Respondent-Appellee State of Hawai'i (the State)] would order it, . . . he would abide by it, but he didn't want to initiate the TRO." Jung further stated that in his opinion, Magbual didn't want to initiate TRO proceedings against Girl because Magbual "felt it would be . . . a way of terminating the relationship or telling . . . [Girl] that he didn't love her any more[.]"

On October 9, 1995, a hearing was conducted to consider a motion by the State to revoke Magbual's probation for violating the probation condition that Magbual not contact Girl. Prior to taking testimony at the revocation hearing, defense counsel represented that an agreement had been reached with the prosecution in which Magbual would admit that he violated the terms and conditions of his probation in return for the State recommending that Magbual be put back on probation with a term of imprisonment for one year, along with the other original terms and conditions of Magbual's probation. The motions court^{3/} then began a colloquy with Magbual. During the colloquy, Magbual stated that he was not thinking clearly, and the hearing proceeded.

^{3/} The court that conducted the probation revocation hearing will be referred to as the "motions court" and the court that decided the HRPP Rule 40 Petition will be referred to as the "circuit court."

At the hearing, a relative of Girl (Girl's relative)^{4/} and Girl's brother, who were then both in the tenth grade, testified that during their ninth grade year at Hilo High School, they had seen Girl and Magbual together on several occasions. Girl's relative testified that on one occasion, Magbual was down the street from Hilo High School in the driver's seat of his truck. Girl was in the passenger seat, and Girl's relative and Girl's friends were in the back of Magbual's truck. Girl's relative testified that he noticed Girl's brother "started walking up the street," so he "told her, ok her brother is coming, so [Girl] left with [Magbual] in the truck, and we--we stayed there until she came back after the brother went back to school." Girl's relative also testified that he had been told by Girl that Magbual "used to take her around, let her drive his truck or his car, whatever, and they used to go all the way by Waimea and stuff." Additionally, Girl would say that "mostly every day . . . she goes to the phone and calls [Magbual], and he brings -- he brings her lunch mostly every day, because when she comes back to school she always has food with her." Girl's relative also identified a photograph given to him by Girl that depicted Magbual and Girl together.

After Girl's relative testified, defense counsel requested a recess, after which he again represented that an

^{4/} The relative of the twelve-year-old girl in this case (Girl) testified that Girl was his "grandma's brother's daughter."

agreement had been reached between Magbual and the State in which Magbual would stipulate that he violated the term of probation regarding contact with Girl in exchange for the prosecution's recommendation that "[Magbual] be replaced back on probation; that as a term and condition of that probation he will do one year of jail time without any work release; and that mittimus will issue . . . on Friday at 5:00 p.m."

The motions court then conducted another colloquy with Magbual. This time, Magbual stated that he was thinking clearly, was not sick, understood and had learned the English language, was not under the influence of any pills, drugs, medications, or alcohol, and did not suffer from any mental illness. However, as the colloquy continued, Magbual denied that he had contact with Girl after being released from jail in February 1994. After defense counsel explained to Magbual that "contact" means verbal as well as physical contact, Magbual admitted that he did have contact with Girl. However, Magbual explained that Girl was the one approaching him and that he would try to get her to go away from him or he would drive to a guard or security guard to seek help in getting Girl to leave. Magbual did not feel that he had done anything wrong.^{5/} Because of Magbual's statement, neither

^{5/} The relevant portion of the colloquy is as follows:

THE COURT: So you think you did nothing wrong?

[MAGBUAL]: That's what I feel, your Honor.

(continued...)

the motions court nor the attorneys felt comfortable with Magbual entering into the plea agreement; therefore, the probation revocation hearing continued.

Girl's brother testified that sometime after Christmas of his ninth grade year, he saw Girl get into Magbual's truck. On two additional occasions during that same school year, he also saw Magbual drop Girl off at school while school was in session.

The last witness to testify for the State was Rodney Aurello, a detective sergeant assigned to the juvenile aids section in Hilo (Sergeant Aurello). Sergeant Aurello testified that, while investigating Magbual's alleged probation violation, he recovered from Girl's relative the photograph of Girl and Magbual. While tracking down where the photograph was taken, Sergeant Aurello learned that in December 1994, Girl had signed a log to take a photograph at the Sears photography studio located at the Prince Kuhio Plaza in Hilo. Sergeant Aurello admitted on

^{5/}(...continued)

THE COURT: Then why are you agreeing to this?

[MAGBUAL]: Well, [defense counsel], my attorney, was --

THE COURT: Okay. Well, maybe you shouldn't tell me what your attorney said.

[PROSECUTOR]: Your Honor, I don't feel comfortable with this.

[DEFENSE COUNSEL]: Me either.

[PROSECUTOR]: I would rather put the hearing on.

THE COURT: Okay.

cross-examination, however, that he had not recovered any negatives or reprints from Sears and thus could not connect the photograph of Girl and Magbual to the December 1994 log entry.

Defense counsel did not present any witnesses at the hearing. He thereafter argued that the condition of Magbual's probation, "You are not to contact [Girl]," calls for affirmative action on Magbual's part and does not state that Magbual is not to have contact with Girl. Defense counsel also pointed out to the motions court how on cross-examination he had elicited testimony from Girl's brother concerning facts that were physically impossible.^{6/} The motions court nevertheless ruled that Magbual had violated a substantial term or condition of his probation and accordingly, granted the motion for revocation of probation. The motions court based its ruling on the three incidents that Girl's brother had testified about during the revocation hearing and the testimony by Girl's relative that Magbual brought lunch for Girl almost every day.

At Magbual's resentencing hearing on October 25, 1995, defense counsel argued that this was an unusual case in which Girl sought out the contact with Magbual. Defense counsel also recounted an incident in which he had personally spent a day sitting with Magbual outside of Magbual's home because Magbual had been forced to leave his own home after Girl came over and

^{6/} In his description of how he saw Girl in Magbual's truck, Girl's brother testified on cross-examination that he was walking towards the ocean and Magbual's truck was facing the ocean. Yet, he testified that the front of the truck was facing him so he could see into the passenger compartment.

would not leave until the police arrived to take her from Magbual's house.^{2/}

Prior to resentencing Magbual, the motions court advised Magbual of his right of allocution and asked him if he wished to tell the court anything. Magbual responded by making the following statement:

Thank you very much, your Honor, for letting me express my feeling. Your Honor, I am trying to truthful as a true American citizen can be honest with you, that there is -- the statement is not true, your Honor.

Your Honor, when [Sergeant Aurello] -- he interviewed [Girl's brother], and [Girl's brother] stated that he saw me on Laimana Street. On the day of my court, October 9, 1995, [Girl's brother] testified that he saw me and her [sic] sister in Waianuenue [Waianuenue] Avenue. Your Honor, it's about -- [Girl's relative] testified also that he saw me and [Girl] on Laimana Street, and a pickup truck. Your Honor, I don't have no brown truck. And I think, your Honor -- whether you take more time the [sic] review

^{2/} Defense counsel recounted the following incident to the motions court:

Your Honor, I have been in contact with [Magbual] since that time, and in fact the [c]ourt is aware that on that one particular day I spent nearly the entire day out in Papaikou [Pāpa'ikou] sitting with [Magbual] in front of a store because he had to leave his own house because [Girl] refused to leave his house, and it was a violation of his probation to have contact with her, and so I instructed him to leave his own house. He sat in front of the store in Pepeekeo [Pepe'ekeo] for approximately six hours waiting for the police officers to arrive and to remove her from his house and take her to the Hilo interim home.

their statement or not, I think -- this is clearly enough that it is not true.

I think, your Honor -- I feel, your Honor, that it is not fair for my trial and my sentencing also, because what I want from the beginning is that -- [Girl] testified also in this [c]ourt, if this is true or not. However, your Honor, when [Sergeant Aurello] interview her, she stated that she did not contact me. Your Honor, I'm not angry or -- to anybody. I love everybody, but if I did anything mistake in this law, please, I wanted to ask you to give me a chance so that I can show to the public, even the society that they can trust me more.

That's all, your Honor.

The motions court then resentenced Magbual to a ten-year term of imprisonment, with credit for time served, and expressed concern that Magbual would not be able to abide by the terms of probation if he were not imprisoned. After sentence was

imposed, defense counsel requested that an HRPP Rule 35^{8/} motion be placed on the record.

On May 20, 1997, Magbual, acting pro se, filed an HRPP Rule 40 Petition, attacking the judgment of conviction in Criminal No. 92-314. In the petition, which was handwritten on a pre-printed form, Magbual stated that he was being held in custody unlawfully and that the "[d]ate of judgment of conviction" that he was attacking was October 25, 1995, and the length of his sentence for sexual assault II was ten years. It appears, therefore, that Magbual was attacking the revocation of his probation by the motions court and his subsequent resentencing to ten years' imprisonment. However, Magbual based his petition on three grounds, which appear to be directed at his conviction in the underlying criminal case:

^{8/} HRPP Rule 35 provides:

CORRECTION OR REDUCTION OF SENTENCE.

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

- A. Ground one: (F) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant [evidence favorable to the defendant].
Supporting FACTS (tell your story **briefly** without citing cases or law): The Judge, . . . did not allow witnesses to testify, which may have benefitted myself, in that [the judge's] decision of Judgement [sic] would have ruled on my behalf of not guilty.
- B. Ground two: (i) Denial of effective assistance counsel.
Supporting FACTS (tell your story **briefly** without citing cases or law): My court appointed attorney . . . denied me effective assistance of counsel after I refused to take a plea bargain deal because I am not guilty of the charges filed against me. He further denied my right of appeal.
- C. Ground three: (j) Denial of right of appeal.
Supporting FACTS (tell your story **briefly** without citing cases or law): I was denied my right of appeal because of [my attorney's] ineffective assistance of counsel.

(Emphases added.)

The public defender's office subsequently filed a Memorandum of Law in Support of [Magbual's] Rule 40 Petition. This memorandum asserted three additional grounds for Magbual's Rule 40 Petition, summarized as follows:

1. Ground (a). The motions court, the prosecution, and defense counsel failed to establish the competency of the minor witnesses.
2. Ground (b). The motions court and defense counsel failed to fully advise Magbual of his right to testify.

3. Ground (c). Magbual's defense counsel, who did not enlist the aid of an interpreter to communicate with Magbual, failed to adequately advise Magbual about the different standards of proof and admissibility of hearsay testimony at a revocation hearing versus a trial; consequently, Magbual could not make a reasoned decision concerning the options available to him.

The circuit court summarily denied Magbual's Rule 40 Petition on May 28, 1999. In its written decision, the circuit court ruled with respect to the grounds alleged by Magbual in the petition, in relevant part, as follows:

Ground 1. If this allegation refers to the conviction of [Magbual] by the court following the no contest plea, it is disallowed by Rule 40(3) inasmuch as it could have been raised on appeal or in a motion to withdraw plea. Otherwise, this ground is not sufficiently plead[ed] to put the court on notice as to the general issue that is the basis of the Rule 40 claim.

Ground 2. Like Ground 1, this allegation appears to refer to the conviction of [Magbual] by the court following the no contest plea. Accordingly, since the issue could have been raised on appeal or in a motion to withdraw plea, Rule 40(3) makes the post-conviction proceedings unavailable. If this ground is construed as a general complaint of ineffective assistance of counsel, then it was elaborated in the Memorandum and it is addressed hereinafter. Any other bases intended by [Magbual] to be set out in ground 2 are not sufficiently plead[ed] to put the court on notice of any valid Rule 40 claim.

Ground 3. [Magbual] does not offer any factual basis to support the allegation that he was denied his right of appeal. This ground is completely frivolous and without a trace of support.

(Citation omitted.) With respect to the grounds asserted by the public defender's office in its memorandum in support of Magbual's Rule 40 Petition, the circuit court concluded, in relevant part, as follows:

Ground (a). This ground alleges that counsel, the prosecutor and the court failed to establish the competency of the minor witnesses who testified at the hearing on the motion to revoke probation. At the hearing, two minors testified; one was 15 years old and the other a sophomore in high school. The record reflects an adequate showing of competency for the following reasons.

Both witnesses clearly understood the questions posed to them and answered the questions appropriately. Moreover, the witnesses possessed the mental capacities to identify people, explain relationships between people, provide geographic directions upon inquiry and describe events.

Given the age of the witnesses and tenor and text of their testimonies, there would have been no good faith basis for the prosecutor or defense counsel to challenge their competency. Even assuming that the issue of the witness' [sic] competency had been raised, it would not have changed the outcome of the revocation hearing.

Ground (b) Citing State v. Tachibana, 79 [Hawai'i] 226 (1995), the Memorandum asserts that [Magbual] was never advised of his right to testify at the hearing on the motion for revocation. This is true. However, the court was clearly advised of [Magbual's] position by [Magbual] himself and nevertheless granted the motion to revoke.

Although not under oath, the record reflects that [Magbual] gave the court a lengthy explanation of his version of the circumstances that formed the basis for the

revocation. In fact, the Memorandum acknowledges that the "long statement concerning the allegation amount[ed] to a defense." (Memorandum at page 3) Assuming that Tachibana applies and [Magbual] should have been advised of his right to testify at the revocation hearing, [Magbual] has failed to establish a colorable claim warranting a Rule 40 hearing because his testimony would not have changed the outcome.

Ground (c) The final ground raised in the Memorandum alleges that pre-Rule 40 defense counsel, . . . failed to adequately advise [Magbual] because [Magbual] did not have a sufficient understanding of English. . . .

. . . [T]he record shows that [Magbual] appeared with [pre-Rule 40 defense counsel] in court numerous times from August 1992 to October 1995. [Magbual] never had an interpreter at any time. [Magbual's] direct statements to the court at the hearing on the motion to revoke demonstrate his ability to communicate in English. The presence of an interpreter at the hearing would not have changed the outcome.

Magbual timely appealed the circuit court's order summarily denying his Rule 40 Petition.

POINTS ON APPEAL

In this appeal, Magbual claims that the circuit court erred in denying his Rule 40 Petition without a hearing because he presented a colorable claim that his defense counsel was ineffective for failing to (1) advise Magbual of his right to appeal from the sentence imposed by the circuit court after his probation was revoked, (2) advise Magbual of his right to testify

at the probation revocation proceeding, and (3) call Magbual to testify as a witness at the probation revocation hearing.

STANDARD OF REVIEW

Whether an HRPP Rule 40 petition made such a showing of colorable claim as to require a hearing before the lower court is a question of law. Therefore, a lower court's summary denial of an HRPP Rule 40 petition based on no showing of a colorable claim is reviewed on appeal de novo, and the right/wrong standard of review applies. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

A colorable claim of ineffective assistance of counsel is stated as long as the alleged errors or omissions of petitioner's counsel "could have had a direct bearing on the ultimate outcome of the case. No showing of actual prejudice to a petitioner's defense is required in order to state a colorable claim of ineffective assistance of counsel." Carvalho v. State, 81 Hawai'i 185, 191, 914 P.2d 1378, 1384 (App. 1996) (quotation marks and citation omitted).

DISCUSSION

A.

In summarily denying Magbual's Rule 40 Petition, the circuit court concluded that the allegations raised by Magbual in grounds 1 and 2 of his petition (which related to Magbual's conviction following his no contest plea) were waived because

they could have been raised on appeal from his conviction or in a motion to withdraw his no contest plea. Additionally, the circuit court concluded that grounds 1 and 2 were not sufficiently pleaded to put the court on notice as to the general issue that is the basis of the Rule 40 claim. Since Magbual has not challenged these conclusions on appeal, he has waived and abandoned any argument as to these conclusions. Berkness v. HECO, 51 Haw. 437, 438, 462 P.2d 196, 197 (1969).

B.

It is well-established that every criminal defendant has a statutory right to appeal an adverse district or circuit court judgment, as well as a due process and equal protection right to effective assistance of counsel to prosecute that appeal. Carvalho, 81 Hawai'i at 191-92, 914 P.2d at 1384-85. Where a defense counsel's conduct jeopardizes a defendant's right to appeal, e.g., where defense counsel files an untimely appeal, fails to advise clients of their right to appeal in forma pauperis, gives erroneous advice of such a substantial nature that the defendant is deprived of the ability to make an informed and intelligent decision on whether to appeal, or causes a defendant to forego an appeal by discouraging the defendant as to the likelihood of success on appeal, an ineffective assistance of counsel question is presented. State v. Caraballo, 62 Haw. 309, 313-14, 615 P.2d 91, 95 (1980).

In this case, the record reflects that no appeal was filed by defense counsel on Magbual's behalf following Magbual's probation revocation. Magbual alleged in ground 3 of his Rule 40 Petition that he was denied his right to appeal due to the ineffectiveness of his counsel. The circuit court concluded that the ground was "completely frivolous and without a trace of support" because Magbual failed to "offer any factual basis to support the allegation that he was denied his right of appeal."

However, HRPP Rule 40(e) states that "[n]o petition shall be dismissed for want of particularity unless the petitioner is first given an opportunity to clarify the petition." Although the public defender's office filed a memorandum in support of Magbual's Rule 40 Petition, the memorandum did not address Magbual's claim that he was denied his right to appeal due to his attorney's "ineffective assistance of counsel." Since a Rule 40 pro se petitioner "should not suffer for his [or her] inability to articulate his claim," Bryant v. State, 6 Haw. App. 331, 335, 720 P.2d 1015, 1019 (1986), Magbual should have been given an opportunity to clarify his Rule 40 Petition and offer a factual basis to support his claim before the circuit court dismissed the petition for want of particularity.

C.

Hawai'i Revised Statutes § 706-625(b) (1993) provides that, where a motion to revoke a defendant's probation has been filed, "the defendant shall be notified by the movant in writing of the time, place, and date of any such hearing, and of the grounds upon which action under this section is proposed." Additionally, the rule provides that "the defendant may appear in the hearing to oppose or support the application, and may submit evidence for the court's consideration."

Magbual contends that he was denied the effective assistance of counsel because he was not properly advised that he had a right to testify at the probation revocation hearing.

The Hawai'i Supreme Court has acknowledged that one of the responsibilities of criminal defense counsel is to advise the defendant on the question of whether or not the defendant should testify. Jones v. State, 79 Hawai'i 330, 334, 902 P.2d 965, 969 (1995). Consequently, "a claim can be made that a defendant's attorney provided ineffective assistance in advising the defendant whether or not to testify", a claim "that is conceptually distinct from a claim that a defendant's right to testify was violated." Id.

In Jones, an HRPP Rule 40 petitioner claimed, in part, that his trial counsel provided ineffective assistance in advising him whether or not to testify at trial. The circuit

court held a hearing on the petition and found that the petitioner had indeed been advised by his defense counsel of his right to testify, a finding that was affirmed by the supreme court. Id. at 335, 902 P.2d at 970.

In this case, the record clearly indicates that Magbual did not take the witness stand to testify at his probation revocation hearing. Additionally, the circuit court did not engage Magbual in a Tachibana^{9/} colloquy. Furthermore, it is not apparent from the record whether Magbual was ever advised by his counsel of his right to testify at the hearing and of the pros and cons of testifying.

It is possible that Magbual's defense counsel did, contrary to Magbual's claim, inform Magbual of his right to testify at the probation revocation hearing. Moreover, Magbual's defense counsel may have informed Magbual of tactical reasons why Magbual should or should not testify at the hearing, and Magbual may have consciously elected not to testify. However, based on the record as it stands, we are unable to determine whether Magbual was properly advised of his right to testify. Under

^{2/} In Tachibana v. State, 79 Hawai'i 226, 231, 900 P.2d 1293, 1298 (1995), the Hawai'i Supreme Court held that "a defendant's personal constitutional right to testify truthfully in his [or her] own behalf . . . may be relinquished only by the defendant" and that "to protect the right to testify under the Hawai'i Constitution, trial courts must obtain an on-the-record waiver of that right in every case in which the defendant does not testify" (internal quotation marks and citations missing). Tachibana involved a defendant's right to testify at trial, and it is not clear whether the Tachibana colloquy would be required at a probation revocation hearing. However, since the issue was not presented on appeal, we need not address it at this time.

these circumstances, Magbual clearly presented a colorable claim that his counsel was ineffective for failing to advise him of his right to testify, and the circuit court, as in Jones, should have held a hearing to allow Magbual's defense counsel the opportunity to explain whether he advised Magbual of Magbual's right to testify at the probation revocation hearing and whether he explained to Magbual the advantages and disadvantages of testifying.

D.

Magbual contends that he was entitled to a hearing on his claim that he was provided ineffective assistance of counsel due to his counsel's failure to call him to testify at his probation revocation hearing.

The supreme court has stated that "the decision whether to call a witness in a criminal trial is normally within the judgment of counsel." State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218, 1230 (1994). Therefore, an attorney's recommendation as to whether a defendant should testify or not will rarely qualify as an error reflecting a "lack of judgment", Jones, 79 Hawai'i at 334, 902 P.2d at 969, or "be second-guessed by judicial hindsight." Reed, 77 Hawai'i at 84, 881 P.2d at 1230. However, if defense counsel provides erroneous legal advice to a defendant, e.g., misinforming the defendant as to the types of evidence that can be used to attack his or her credibility on

cross-examination, this could qualify as a "lack of skill," amounting to ineffective assistance of counsel. Jones, 79 Hawai'i at 334-35, 902 P.2d at 969-70. Also, if defense counsel fails to perform sufficient preparation and investigation to be able to adequately advise a defendant whether or not to testify, e.g., by failing to ascertain the full scope of a defendant's possible testimony, this could constitute a "lack of diligence," amounting to ineffective assistance of counsel. Id. at 335, 902 P.2d at 970. Additionally, in a case which rests upon the credibility of the defendant and the victim, a counsel's failure to call witnesses who could have bolstered the defendant's credibility and thus directly affected the outcome of the case may amount to ineffective assistance of counsel. Briones v. State, 74 Haw. 442, 465, 848 P.2d 968, 977.

The supreme court has instructed that where "the record is unclear or void as to the basis for counsel's actions, counsel shall be given the opportunity to explain his or her actions in an appropriate proceeding before the trial court judge." Briones, 74 Haw. at 463, 848 P.2d at 977. Since the record in this case is unclear or void as to whether defense counsel's failure to call Magbual as a witness was the result of informed judgment or constitutionally inadequate preparation, we conclude that an evidentiary hearing should have been conducted by the circuit court and Magbual's defense counsel should have been given the opportunity to explain his reasons for not calling

Magbual as a witness. Cf. Matsuo v. State, 70 Haw. 573, 578, 778 P.2d 332, 335 (1989) (holding that unless trial counsel is given the opportunity to explain his reasons for not calling five inmates as witnesses at trial, any prejudice demonstrated by the petitioner would be speculative and any ineffective assistance of counsel determination would be premature).

CONCLUSION

In light of the foregoing analysis, we vacate the circuit court's May 28, 1999 order summarily denying Magbual's Rule 40 Petition and remand this case to the circuit court for further proceedings. On remand, the circuit court is instructed to (1) allow Magbual the opportunity to clarify ground 3 of his Rule 40 Petition and if, as clarified, a colorable claim of ineffective assistance of counsel is alleged, conduct an evidentiary hearing on the ground alleged; and (2) conduct an evidentiary hearing on Magbual's claim that he was denied effective assistance of counsel due to counsel's failure to advise him of his right to testify and call him as a witness.

DATED: Honolulu, Hawai'i, August 16, 2000.

On the briefs:

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