

NO. 22737

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

LAWRENCE M. FUJII, Petitioner-Appellant, v.  
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(S.P.P. No. 98-0042 (Cr. No. 96-0224))

SUMMARY DISPOSITION ORDER

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

This is essentially a credibility case.

Petitioner-Appellant Lawrence M. Fujii (Fujii) appeals from the August 11, 1999 "Findings of Fact, Conclusions of Law, and Order Denying Petition as to Ineffective Assistance of Counsel Claim Based on Failure to File Notice of Appeal" (August 11, 1999 Order),<sup>1</sup> entered by the Circuit Court of the First Circuit (the circuit court). The August 11, 1999 Order denied Fujii's Hawai'i

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<sup>1</sup> In his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition, Petitioner-Appellant Lawrence M. Fujii (Fujii) sought relief from the April 30, 1996 judgment on three grounds, all of which were based on the ineffective assistance of trial counsel. Ground one alleged that counsel failed to file a motion to dismiss the charge against Fujii pursuant to HRPP Rule 48. Ground two alleged that counsel improperly allowed Fujii to waive his right to a jury trial. Ground three alleged that counsel failed to file an appeal from the judgment. The petition was decided by orders entered on March 23, 1999 and August 11, 1999. The March 23, 1999 order summarily denied the petition without a hearing as to grounds one and two. The August 11, 1999 "Findings of Fact, Conclusions of Law, and Order Denying Petition as to Ineffective Assistance of Counsel Claim Based on Failure to File Notice of Appeal" (August 11, 1999 Order) denied the petition, after a hearing, as to ground three. Fujii does not challenge the March 23, 1999 order in this appeal. Only the August 11, 1999 Order is at issue in this appeal.

Rules of Penal Procedure (HRPP) Rule 40 petition seeking post-conviction relief from the April 30, 1996 judgment convicting Fujii of escape in the second degree (escape judgment).

Fujii contends that he was denied the effective assistance of trial counsel because his trial counsel did not file a notice of appeal from the escape judgment, as requested by Fujii. At a June 25, 1999 hearing on Fujii's petition, however, Fujii's trial counsel testified that he did advise Fujii of his right to appeal, the chances of Fujii prevailing on appeal, and of other options available to Fujii to challenge different aspects of the escape judgment. Fujii's trial counsel also testified that although he was instructed by Fujii to file a motion for reconsideration of sentence, Fujii never instructed his trial counsel to file an appeal from the escape judgment until after the time to appeal had elapsed.

In its August 11, 1999 Order denying Fujii's HRPP Rule 40 petition, the circuit court entered the following Findings of Fact and Conclusions of Law:

#### FINDINGS OF FACT

1. A few days after [Fujii] was convicted and sentenced on April 30, 1996, [Fujii's] counsel, . . . spoke with [Fujii] and fully advised him of his right to appeal and of the need to file a notice of appeal within thirty days of the conviction.

2. After having been so advised, [Fujii] knowingly, intelligently, and voluntarily indicated to [trial counsel] that he did not want to appeal his conviction.

3. Based on [Fujii's] representation that he did not want to appeal, [trial counsel] did not file a notice of appeal.

4. There is no credible evidence that [Fujii] communicated to [trial counsel] a request to appeal his conviction at any time prior to the latter part of July 1996.

5. The first time [Fujii] communicated any desire to appeal was in the latter part of July 1996, when [Fujii] told [trial counsel] that he wished to appeal if certain credit for time served was not acknowledged by the Hawaii Paroling Authority.

6. Thereafter, [trial counsel] determined that the paroling authority had in fact given [Fujii] the credit for time served that he sought, thus rendering unnecessary an appeal on this point.

#### CONCLUSIONS OF LAW

1. The right to appeal may be waived if the waiver is knowingly and intelligently made. See State v. Caraballo, 62 Haw. 309, 314-315 (1980).

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2. When, after having been fully advised of the right to appeal, [Fujii] told [trial counsel] that he did not want to appeal, [Fujii] knowingly, intelligently, and voluntarily waived his right to appeal.

3. Given the waiver, [trial counsel] was not obligated to file a notice of appeal. Cf. Carvalho v. State, 81 [Hawai'i] 185, 192 (App. 1996).

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4. By the latter part of July 1996, when [Fujii] first communicated to [trial counsel] the idea of filing an appeal, the time for filing a notice of appeal, as well as the time for requesting an extension thereof, had expired. See HRAP Rule 4(b).

5. Consequently, [trial counsel] was not ineffective in failing to file a notice of appeal.

Questions of credibility are within the province of the trial court, State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996). Our review of the record in this case indicates the presence of substantial evidence to support the circuit court's findings of fact, upon which the circuit court's conclusions of

law were based. Therefore, we have no reason to disturb the circuit court's August 11, 1999 Order.

Accordingly, we affirm the August 11, 1999 Order from which Fujii appeals.

DATED: Honolulu, Hawai'i, December 6, 2000.

On the briefs:

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for petitioner-appellant.

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City and County of Honolulu,  
for respondent-appellee.