

NO. 22758

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

RICHARD H. BLAISDELL, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. No. 99-0005
(Cr. Nos. 90-1541/92-2513))

MEMORANDUM OPINION

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

Petitioner-Appellant Richard H. Blaisdell (Petitioner) appeals the "Findings of Fact, Conclusions of Law, and Order Dismissing Three Petitions for Post-Conviction Relief Filed on April 7, 1999" (Order), entered by Judge Victoria S. Marks of the Circuit Court of the First Circuit (the circuit court) on August 5, 1999. The circuit court's twenty-page Order dismissed the three petitions on grounds that the claims raised therein had either "been raised and ruled upon previously" or were "patently frivolous and without a trace of support."

Based on our review of the record before us, we affirm.

BACKGROUND

The long and winding procedural history of this case is set out in detail in the circuit court's Order. In a nutshell, Petitioner was indicted on August 28, 1990 in Cr. No. 90-1541 and charged with committing twenty-six counts of varying degrees of

sexual assault and attempted sexual assault and one count of first degree terroristic threatening against seven minor girls who were less than fourteen years old (alleged victims). In August 1992, the foregoing charges were dismissed without prejudice due to a violation of the speedy trial provisions of Hawai'i Rules of Penal Procedure (HRPP) Rule 48. On August 20, 1992, in Cr. No. 92-2513, Petitioner was reindicted on twenty-four counts of sexual assault, attempted sexual assault, and terroristic threatening. Petitioner subsequently moved to sever the twenty-four counts for trial purposes, and Petitioner's motion was granted.

The first jury trial, which related to the counts involving three of the alleged victims, resulted in a February 24, 1994 judgment (the First Judgment), convicting and sentencing Petitioner on two counts of sexual assault in the first degree and six counts of sexual assault in the third degree. Unhappy with the First Judgment, Petitioner filed the following: (1) a February 18, 1994 petition for a writ of mandamus with the Hawai'i Supreme Court, claiming that his HRPP Rule 48 and constitutional rights to a speedy trial were violated (this petition was denied by the supreme court on procedural grounds); (2) a February 18, 1994 petition for writ of habeas corpus with the United States (U.S.) District Court for the District of Hawai'i, claiming that his constitutional right to a

speedy trial was violated (this petition was dismissed on August 23, 1994 for Petitioner's failure to exhaust state remedies, and Petitioner appealed that ruling to the Ninth Circuit Court of Appeals, which affirmed the dismissal); and (3) an April 25, 1994 appeal (No. 18018) from the First Judgment (the appeal was assigned to this court, which affirmed the First Judgment by summary disposition order (SDO) on April 30, 1997).

The second jury trial, which related to the remaining counts involving four of the alleged victims, resulted in a March 10, 1995 judgment (the Second Judgment), convicting and sentencing Petitioner for three counts of sexual assault in the first degree, one count of attempted sexual assault in the first degree, three counts of sexual assault in the second degree, and one count of terroristic threatening. Following entry of the Second Judgment, Petitioner filed the following: (1) an April 5, 1995 appeal (No. 18881) that was assigned to this court, which affirmed the Second Judgment by SDO on April 30, 1997; (2) a May 10, 1996 petition for writ of habeas corpus in the U.S. District Court for the District of Hawai'i, which dismissed the petition on August 28, 1996 for Petitioner's failure to exhaust state remedies (this dismissal was affirmed by the Ninth Circuit Court of Appeals on Petitioner's further appeal); and (3) a December 12, 1997 petition for writ of habeas corpus in the U.S. District Court for the District of Hawai'i, which dismissed the

petition on June 22, 1998 for Petitioner's failure to exhaust state remedies.

On April 7, 1999, Petitioner filed the three HRPP Rule 40 petitions for post-conviction relief which underlie this appeal. The first two petitions, which are filled-out, pre-printed HRPP forms, entitled "Petition for Post-Conviction Relief," incorporated the grounds for relief articulated in Petitioner's third typewritten petition. In the third petition, Petitioner alleged twenty-nine "facts" and nineteen "issues" and raised a number of arguments as to why he was entitled to HRPP Rule 40 relief. Petitioner's arguments can generally be categorized as follows:

(1) he was unconstitutionally and illegally indicted because

- when the alleged victims were being questioned and videotaped by a police investigator, they were "fitted with earphone plugs and microphones" and told what to say by a deputy prosecutor "and others", who "whispered" answers to them and communicated with them through a doll "electronically wired to permit secret communications" during the interviews;
- the deputy prosecutor gave the alleged victims "scripts" of what she wanted them to testify to before the grand jury, "coached" them to "get them ready for the [g]rand [j]ury", and "took the well[-]rehearsed witnesses before the [g]rand [j]ury";
- the police videotapes in which the alleged victims were interviewed about their allegations against Petitioner were made long after the "scripted" grand jury proceedings;
- the "[a]lleged victims were allowed to watch each others [sic] police interviews and were given video tapes of each others [sic] interviews";

- the deputy prosecutor and victim witness advocate "wined and dined the alleged victims at Kentucky Fried Chicken interviews to further brainwash the alleged victims as to their lies";
- the government bribed the victims to testify falsely against Petitioner by promising them or their parents that they would receive up to \$10,000 from the Criminal Injuries Compensation Commission if they so testified;
- the deputy prosecutor and victim witness advocate falsified applications to the Criminal Injuries Compensation Commission so that the victims could "falsely obtain awards";
- the deputy prosecutor, lead detective, and alleged victims committed perjury before the grand jury and at trial;
- the lead detective falsified information in his investigative report;
- court reporter Anthony Ornellas "falsified hundreds of words and statements, knowingly and conspiringly, when he transcribed the audio portion of the video tapes to the paper" in order "to make [P]etitioner look guilty, and then pass[ed] these false documents on to all the litigants in the court";
- the alleged victims, the investigating detective, and the deputy prosecutor committed perjury;
- the detectives, deputy prosecutor, court reporter, and others conspired "with the alleged victims and their mothers to convict [Petitioner] at all costs" by committing felonies against him;
- the deputy prosecutor misled the grand jury into believing that Respondent-Appellee State of Hawai'i's (the State's) witnesses were reliable; and
- the State had no jurisdiction to indict Petitioner "in view of the government misconduct described in [the] writ;

(2) Petitioner's constitutional right to a speedy trial was violated; and

(3) There was insufficient evidence to convict Petitioner.

Attached as exhibits to Petitioner's third petition were several blurry xeroxed copies of pictures taken from the videotaped police interviews of the alleged victims that Petitioner alleged demonstrated the "outrageous government conduct" used to secure his conviction. For example, Exhibit A, according to Petitioner, was a picture of an alleged victim being interviewed by Detective Ned Campbell (Detective Campbell). In a typewritten caption below the dark and fuzzy picture, Petitioner remarked:

Notice the earphone plug in alleged victim's ear. You can very plainly see the wire coming [sic] from her ear and going down her neck.

Also, at this point in the video, you can hear someone whisper for [alleged victim] to SIT BACK IN THE CHAIR BECAUSE THE CAMERA IS PICKING IT UP.

Notice too, how there is no earring on [alleged victim's] right ear, it was removed to accommodate [sic] the earplug. [See video print exhibit "B"], which shows a long dangling earring hanging on her left ear.

(Emphasis in original.) Also attached as exhibits to Petitioner's third petition were various "Decision[s] and Order[s]" of the Criminal Injuries Compensation Commission, awarding compensation to several of the alleged victims for the pain and suffering they experienced as a result of Petitioner's alleged acts.

In the August 5, 1999 Order dismissing Petitioner's three petitions, the circuit court, without conducting an evidentiary hearing, concluded as a matter of law that some of the issues raised by Petitioner had previously been raised and

decided, and other issues were "patently frivolous and without a trace of support."

Petitioner filed a timely appeal from the Order on August 18, 1999.

DISCUSSION

HRPP Rule 40 provides, in relevant part, as follows:

POST-CONVICTION PROCEEDING.

(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 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.

For the purposes of this rule, a judgment is final when the time for direct appeal under Rule 4(b) of the Hawai'i Rules of Appellate Procedure has expired without appeal being taken, or if direct appeal was taken, when the appellate process has terminated, provided that a petition under this rule seeking relief from judgment may be filed during the pendency of direct appeal if leave is granted by order of the appellate court.

(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.

. . . .

(f) Hearings. If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition or at any later proceeding.

The petitioner shall have a full and fair evidentiary hearing on the petition. The court shall receive all evidence that is relevant and necessary to determine the petition, including affidavits, depositions, oral testimony, certificate of any judge who presided at any hearing during the course of the proceedings which led to the judgment or custody which is the subject of the petition, and relevant and necessary portions of transcripts of prior proceedings. The petitioner shall have a right to be present at any evidentiary hearing at which a material question of fact is litigated.

(g) Disposition.

(1) *In Favor of the Petitioner.* If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceeding, or with respect to custody based on such judgment, and such supplementary orders as to arraignment, retrial, custody, bail, discharge or other matters as may be necessary or proper.

(2) *Against the Petitioner.* The court may dismiss a petition at any time upon finding the petition is patently frivolous, the issues have been previously raised and ruled upon, or the issues were waived. The court may deny a petition upon determining the allegations and arguments have no merit.

(3) *The Judgment.* The court shall state its findings of fact and conclusions of law in entering its judgment on the petition.

(h) Review. Any party may appeal to the supreme court from a judgment entered in the proceeding in accordance with Rule 4(b) of the Hawai'i Rules of Appellate Procedure.

(Emphases added.)

The supreme court has stated that on an appeal from a denial of an HRPP Rule 40 petition without a hearing, the dispositive question

is whether the trial record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court.

. . . [T]he appellate court steps into the trial court's position, reviews the same trial record, and redecides the issue. Because the appellate court's determination of "whether the trial record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court" is a question of law, the trial court's decision is reviewed *de novo*. . . . [T]hus, the right/wrong standard of review is applicable.

Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994)

(citations and emphasis omitted).

We examine, *de novo*, therefore, whether the circuit court was right in concluding that no colorable claim requiring a hearing was presented by Petitioner's petitions.

A.

In its Order, the circuit court concluded, after reviewing the briefs submitted by Petitioner in his direct appeals from the First and Second Judgments, that the following issues raised by Petitioner in his HRPP Rule 40 petitions had previously been raised by Petitioner in his direct appeals from the First and Second Judgments and accordingly, had been ruled upon by this court when we affirmed the First and Second Judgments: (1) whether Petitioner's constitutional right to a speedy trial was violated; (2) whether there was sufficient evidence to convict Petitioner; (3) whether the prosecutor committed various forms of misconduct, including "scripting" and coaching witnesses, during the pre-indictment investigation and trials of Petitioner; (4) whether the alleged victims' involvement with the Criminal Injuries Compensation Commission tainted Petitioner's conviction; and (5) whether transcripts of police interviews of the alleged victims were altered to enhance the chances of the case being charged.

Our review of the record, including the briefs submitted by Petitioner in his previous appeals, confirms that the circuit court was correct in so concluding.

B.

The circuit court also concluded that several issues presented by Petitioner in his HRPP Rule 40 petitions were patently frivolous and without a trace of support:

4. The charges in Cr. No. 90-1541 were dismissed on August 4, 1992. To the extent that Petitioner's present claims pertain to Cr. No. 90-1541, therefore, they are patently frivolous and without a trace of support.
5. The remaining conclusions of law herein pertain to Cr. No. 92-2513.

. . .

9. With regard to the sufficiency of the evidence adduced at trial to support Petitioner's conviction, Petitioner claims that he

did not have a fair trial when the only corroborating evidence for one alleged victim came from the others, who all lied

Statement of Issues, at 11; and that the prosecutor

misled the [g]rand [j]ury into believing that the [S]tate's witnesses were reliable

Statement of Issues, at ¶ 15.

. . . .

12. . . . [T]he Hawai'i Supreme Court has held that:

[T]he credibility of witnesses and the weight of the evidence . . . is the province of the trier of fact. . . . [T]he finder of fact may accept or reject any witness's testimony in whole or in part.

State v. Birdsall, 88 Hawai'i 1, 8-9, 960 P.2d 729, 736-37 (1998) (citations omitted).

13. This claim, therefore, is patently frivolous and without a trace of support.

. . .

18. With regard to the alleged subornation of witnesses, Petitioner makes the following claims:

Detective Campbell said to alleged victim V.S.
"COME ONE [sic] WE[']RE GONNA END IT AND GET THE
MONEY"

Statement of Facts, at ¶ 1;

[the] indictment [was not] constitutionally
valid [because] the police detective in charge
mentioned money to induce the victims to say the
desired answers

Statement of Issues, at ¶ 6; and

government officials committed Bribery,
conspiracy, perjury, subornation of perjury
. . . [and] witness tampering

Statement of Issues, at ¶ 18.

19. Where prosecutorial misconduct before the grand jury is alleged, Hawai'i courts have adopted the standard set by the United States Court of Appeals for the Ninth Circuit:

only in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment returned by an apparently unbiased grand jury.

State v. Pulawa, 62 Haw. 209, 215, 614 P.2d 373, 377 (1980) (quoting United States v. Kennedy, 564 F.2d 1329, 1338, [sic] (9th Cir. 1977)). Accordingly,

the grand jury need not be advised of all matters bearing upon the credibility of potential witnesses. Dismissal of an indictment is required only in flagrant cases in which the grand jury has been deceived in some way, as where perjured testimony has knowingly been presented.

Pulawa, 62 Haw. at 215, 614 P.2d at 377 (emphasis added).

20. Petitioner alleged at trial that [Detective Campbell] of the Honolulu Police Department had offered money to grand jury witness V.S. in exchange for her perjured testimony. Petitioner claimed that [Detective] Campbell's offer -- "let's get the money" -- had been captured on videotape during the preinterview portion of V.S.'s statement.

Despite repeated attempts, Petitioner was never able to substantiate this claim. Both [Detective] Campbell and V.S. testified at trial that [Detective] Campbell had never made such an offer and, after reviewing the purported recording of [Detective]

Campbell's statement, they denied that the recorded sounds contained the words "let's get the money." Transcript of Proceedings of October 17, 1994 (Tr 10/17/94), at 130-32 (Exhibit I); Transcript of Proceedings of October 18, 1994 (Tr 10/18/94), at 63 (Exhibit J); Transcript of Proceedings of October 20, 1994 (Tr 10/20/94), at 82-83 (Exhibit K); Transcript of Proceedings of October 27, 1994 (Tr 10/27/94), at 80-81 (Exhibit L). The court reporter who attempted, at the court's request, to transcribe the recording out of the presence of the jury found the disputed sounds "indiscernible." (Tr 10/18/94, at 62-68).

After the original videotape was played for the jury, Petitioner's counsel claimed that the tape proved that [Detective] Campbell had made the statement. The court responded:

I understand that's what your position is that's what your argument is. I'm not so sure that's what the evidence is.

Transcript of Proceedings of October 31, 1994 (Tr 10/31/94), at 50 (Exhibit M). Significantly, even Petitioner acknowledged that he did not hear the alleged statement when the original tape was played for the jury:

[The jury] had no idea what to be listening for, and I didn't even hear it. And if it's not in there, then there's no damage. But if it's there, that's a Class C felony that was committed against me[.]

(Tr 10/31/94, at 53-54 (emphasis added)).

21. This claim, therefore, is patently frivolous and without a trace of support.
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28. . . . Petitioner's claim that the court reporter "knowingly and conspiringly" mistranscribed videotaped statements of grand jury witnesses (Statement of Facts, at ¶ 26) for the purpose of "making Petitioner look guilty" (Statement of Issues, at ¶ 26) is implausible at best, since the court reporter apparently prepared the transcripts at the request of Petitioner's counsel. (Tr 10/27/94, at 40). More importantly, the transcripts were never introduced into evidence, and were used only by Petitioner's counsel to refresh the recollection of witnesses, despite the availability of the original videotapes, and despite counsel's own contention that the transcripts were inaccurate.
29. This claim, therefore, is patently frivolous and without a trace of support.

. . .

33. With regard to the alleged secret communication of information to witnesses, Petitioner makes the following claims:

[the] indictment [was not] constitutionally valid [because]all [sic] parties, during the interviews, were electronically wired to permit secret communications to the alleged victims to provide the desired answers

Statement of Issues, at ¶ 2;

[the] indictment [was not] constitutionally valid [because] the police in charge of the interview use[d] a doll equipped with a transmitter and an antenna placed in front of one of the alleged victims to allow her testimony to be simultaneously transmitted to an alleged victim in another room

Statement of Issues, at ¶ 4; and

government officials . . . committed . . . witness tampering

Statement of Issues, at ¶ 18.

34. The interview room was necessarily equipped with at least one microphone to enable the video camera to record sounds as well as images: Detective Campbell testified that a microphone was installed "[i]n the wall in the ceiling of that room[,]" (Tr 10/20/94, at 77), and that interviewers sometimes wore headphones so that their colleagues in the adjacent camera room could suggest additional questions. (Tr 10/27/94, at 85-86). Hence, neither the police nor the prosecutors had reason to "wire" the witnesses or to conceal additional microphones, transmitters, or antennae in dolls.

Nor does the mere use of a microphone establish that information was transmitted, either simultaneously or after recording, to witnesses in the course of their testimony. Indeed, it is disingenuous to suggest that a child witness would be capable of engaging actively in one conversation while listening simultaneously to another.

35. This claim, therefore, is patently frivolous and without a trace of support.

. . .

36. With regard to the alleged presence of prosecutors, examiners, and victims in the interview during the questioning of witnesses, Petitioner claims that his indictment was not "constitutionally valid" because:

it [wa]s comprised of hearsay answers provided in response to whispered instructions given by prosecutors and examiners while hidden in the interview rooms out of camera view

Statement of Issues, at ¶ 1;

other victims were allowed in the same room during the questioning of other witnesses

Statement of Issues, at ¶ 5[;] and

government officials . . . committed . . . witness tampering

Statement of Issues, at ¶ 18.

37. Detective Campbell testified at trial that "no one else [was] in the room" while he interviewed each victim, (Tr 10/20/94, at 77), and the jury apparently found him sufficiently credible to return a guilt [sic] verdict. The Hawai'i Supreme Court has held that:

[T]he credibility of witnesses and the weight of the evidence . . . is the province of the trier of fact. . . . [T]he finder of fact may accept or reject any witness's testimony in whole or in part.

State v. Birdsall, 88 Hawai'i 1, 8-9, 960 P.2d 729, 736-37 (1998) (citations omitted).

38. This claim, therefore, is patently frivolous and without a trace of support.

. . .

39. With regard to alleged contempt of court, Petitioner claims that:

it is [not] constitutional for government officials who committed . . . contempt of court . . . [to] go unpunished

Statement of Issues, at 18.

40. The prosecutors in this case were never charged with contempt.

41. This claim, therefore, is patently frivolous and without trace of support.

(Emphases in original; some brackets and ellipses in original.)

Based on our review of the record, we cannot conclude that the circuit court was wrong in concluding that the foregoing

claims were patently frivolous and without trace of support. As the trial transcripts referenced by the circuit court indicate, the same issues raised by Petitioner in his petitions were raised by Petitioner during his trials below. Moreover, to the extent that Petitioner, in appealing the First and Second Judgments, did not challenge the circuit court's rulings with respect to the foregoing claims, he is deemed to have waived them. HRPP Rule 40(a)(3).

Affirmed.

DATED: Honolulu, Hawai'i, May 25, 2001.

On the briefs:

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