

NO. 23081

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

WILLIAM HOWARD BRANCO, Petitioner-Appellant,  
v. STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE THIRD CIRCUIT COURT  
(S.P.P. NO. 99-0005)

MEMORANDUM OPINION

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

Petitioner-Appellant William Howard Branco (Branco) appeals the circuit court's December 22, 1999, order granting in part and denying in part his petition for post-conviction relief (Rule 40 petition) filed July 14, 1999, pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP). We affirm.

**I.**

By Amended Complaint filed August 19, 1992, Branco was charged with the following: (1) Count I, Burglary in the First Degree, in violation of § 708-810(1)(c) of the Hawai'i Revised Statutes (HRS); (2) Count II, Attempted Murder in the Second Degree, in violation of HRS §§ 705-500(1)(b) and 707-701.5(1); (3) Counts III and VI, Possession or Use of Firearm in the Commission of a Felony, in violation of HRS § 134-6(a);

(4) Count IV, Ownership or Possession Prohibited, in violation of HRS § 134-7(b); and (5) Count V, Kidnapping, in violation of HRS § 707-720(1)(e).

On December 9, 1992, Branco entered no contest pleas to (1) Attempted Manslaughter as a lesser included offense charged under Count II of the Amended Complaint, (2) Possession or Use of Firearm in the Commission of a Felony as charged in Count III of the Amended Complaint, and (3) Ownership or Possession Prohibited as charged in Count IV of the Amended Complaint.

Branco was sentenced on February 12, 1993, to a maximum ten years of imprisonment each for the Attempted Manslaughter charge under Count II and Ownership or Possession Prohibited charge under Count IV and a maximum twenty years of imprisonment for the Possession or Use of Firearm in the Commission of a Felony charge under Count III. Branco was ordered to serve the sentences concurrently. Judgment was entered on February 16, 1993.

On July 14, 1999, Branco filed a Rule 40 petition for post-conviction relief. In his petition, Branco contended the State had failed to provide him with his sentencing transcripts and any related documents. Branco also contended that "[t]he Place to keep and the felon in possession of a fire arm [sic], is an illegal Charge and sentence under the reasoning of State v. Jumila, 87 Haw [Hawai'i] 1 (1998)."

On December 22, 1999, in response to Branco's Rule 40 petition, the Circuit Court of the Third Circuit, State of Hawai'i, filed an Order Granting in Part and Denying in Part Petition to Vacate, Set Aside, or Correct Judgment. The court found Branco's conviction of Attempted Manslaughter in Count II was "the underlying offense of the charge" of Possession or Use of a Firearm in the Commission of a Felony (HRS § 134-6(a)), and the court therefore vacated Branco's conviction and sentence for manslaughter pursuant to State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998). The court found Jumila did not apply to Branco's conviction for Ownership or Possession Prohibited (HRS § 134-7(b)). The court also found that the State was under no legal obligation to provide Branco with his sentencing transcripts and any related documents.

Branco contends the circuit court erred in its December 22, 1999, order in applying Jumila to Branco's multiple convictions and sentences and in not ordering the State to provide Branco with his sentencing transcripts.

## **II.**

Branco contends the circuit court erred when it did not reverse his conviction of ownership or possession of a firearm prohibited by a felon (HRS § 134-7(b)). Branco contends Jumila mandates such a reversal. Branco is wrong. Jumila applies only to HRS § 134-6(a), not HRS § 134-7(b).

Despite Branco's poorly framed Rule 40 petition, the circuit court correctly vacated Branco's conviction of Attempted Manslaughter pursuant to HRS § 134-6(a) and Jumila. The court properly let Branco's conviction and sentence for Possession or Use of a Firearm in the Commission of a Felony under HRS § 134-6(a) stand.

### III.

Prior to filing his Rule 40 petition, Branco did not request the State to provide him with "his sentencing transcripts and any related documents." Had Branco appealed his judgment of conviction and sentence (and done so in forma pauperis), he could have requested his sentencing transcripts. State v. Pence, 53 Haw. 157, 488 P.2d 1177 (1971); State v. Hayashida, 55 Haw. 453, 522 P.2d 184 (1974). Branco's contention that the State's failure, or the court's failure, to make his sentencing transcripts available to him is without merit.

Hawai'i Rules of Penal Procedure Rule 40(f) provides in part:

**(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 the right to be present at any evidentiary hearing at which a material question of fact is litigated. [Emphasis added.]

If Branco's Rule 40 petition alleged facts that demonstrated his sentencing transcripts were relevant and necessary to determine his petition, Branco would have been entitled to the sentencing transcripts. However, his sentencing transcripts were not relevant and necessary to determine the issue raised in his petition of whether "[t]he Place to keep and the felon in possession of a fire arm, is an illegal Charge and sentence under the reasoning of State v. Jumila . . . ."

#### IV.

The December 22, 1999, circuit court order granting in part and denying in part Branco's Rule 40 petition for post-conviction relief is affirmed.

DATED: Honolulu, Hawai'i, December 21, 2000.

On the briefs:

William H. Branco  
Petitioner-Appellant Pro Se.

Acting Chief Judge

Darien W.L. Ching,  
Deputy Prosecuting Attorney,  
County of Hawaii,  
for Respondent-Appellee.

Associate Judge

Associate Judge