NO. 23959

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

EUGENE JAMES HUTCH, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P.P. NO. 99-0020)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Foley, JJ.)

Petitioner-Appellant Eugene James Hutch (Hutch) appeals from the circuit court's[1] (1) December 23, 1999 "Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Petition for Post-Conviction Relief" and (2) December 12, 2000 "Order Denying Defendant's Petition for Post-Conviction Relief." We affirm.

BACKGROUND

This court's Memorandum Opinion filed on January 22, 1999, in appeals nos. 21159 and 21284, consolidated into appeal no. 21159, states as follows:

> On December 19, 1994, in Cr. No. 94-2819, the State of Hawaiʻi (State) charged Hutch with one count of Promoting a Dangerous Drug in the Third Degree and one count of Unlawful Use of Drug Paraphernalia.
>
> On June 5, 1996, in Cr. No. 96-1076, the State charged Hutch with one count of Unlawful Use of Drug Paraphernalia and one count of Promoting a Dangerous Drug in the Third Degree.

[1] Circuit Court Judge Virginia Lea Crandall presided.

On October 29, 1996, in Cr. No. 96-2224, the State charged Hutch with one count of Robbery in the Second Degree.

If convicted of any of the above offenses other than the Unlawful Use of Drug Paraphernalia offenses, Hutch would be a repeat offender. Although Hawai'i Revised Statutes (HRS) § 706-606.5(1) (1993) mandates that repeat offenders "shall be sentenced to a [specified] mandatory minimum period of imprisonment without possibility of parole during such period[,]" HRS § 706-606.5(4) (Supp. 1997) states in relevant part that "[t]he court may impose a lesser mandatory minimum period of imprisonment without possibility of parole than that mandated by this section where the court finds that strong mitigating circumstances warrant such action. . . . The court shall provide a written opinion stating its reasons for imposing the lesser sentence."

On August 21, 1996, pursuant to a plea agreement executed by a deputy prosecuting attorney (DPA), acting for the City and County of Honolulu prosecutor representing the State, Hutch pled guilty to the counts of Promoting a Dangerous Drug in the Third Degree charged in Cr. Nos. 94-2819 and 96-1076. The plea agreement was that Hutch would plead guilty to those two counts and be sentenced to a maximum indeterminate sentence of five years for each count in exchange for the State to nolle prosequi the counts of Unlawful Use of Drug Paraphernalia and recommend a reduced mandatory minimum sentence of two years and four months in Cr. No. 94-2819 and a mandatory minimum sentence of one year and eight months in Cr. No. 96-1076. The record indicates that the court bound itself to this plea agreement.

On December 18, 1996, subject to another plea agreement executed by the DPA, Hutch pled guilty to the Robbery in the Second Degree charged in Cr. No. 96-2224. This plea agreement called for Hutch to plead guilty in exchange for the State to "recommend a sentence of 10 years." The agreement was silent on the subject of a mandatory minimum sentence and permitted the State to argue for a sentence consecutive to the sentences imposed in Cr. Nos. 94-2819 and 96-1076.

On February 19, 1997, the circuit court sentenced Hutch in all three cases. In Cr. No. 94-2819, the court sentenced Hutch to an indeterminate term of imprisonment for five years with a mandatory minimum term of two years and four months. In Cr. No. 96-1076, the court sentenced Hutch to an indeterminate term of imprisonment for five years with a mandatory minimum term of one year and eight months. In Cr. No. 96-2224, the court sentenced Hutch to serve a ten-year indeterminate term of imprisonment. This sentence was silent on the subject of a mandatory minimum. All of the sentences were ordered to run concurrent to each other.

By three letters to the Hawai'i Paroling Authority (HPA), two dated February 19, 1997 and one dated March 27, 1997, the DPA recommended the following minimum sentences in the following cases:

Cr. No. 94-1829 - two years and four months.
Cr. No. 96-1076 - one year and eight months.
Cr. No. 96-2224 - two years and four months.

On May 21, 1997, after a hearing on May 15, 1997, the HPA set Hutch's minimum term of imprisonment in each of the three cases at four years.

Hutch filed his Petition for Post Conviction Relief on July 14, 1997 (July Petition). The grounds asserted were (1) the State violated the plea agreement when the HPA set Hutch's minimum term at four years instead of two years and eight months and (2) Hawai'i Administrative Rules (HAR) Rule 17-202-1(b) is unconstitutional because it does not allow Hutch to gain help from "jailhouse lawyers." On January 7, 1998, the circuit court summarily denied the July Petition without a hearing. Hutch filed his Notice of Appeal of this denial on January 15, 1998.

On September 24, 1997, Hutch filed a petition for a writ of habeas corpus pursuant to HRS chapter 660-5 (1993) (September Petition). The grounds alleged in this September Petition were the same grounds alleged in the July Petition. On November 7, 1997, the circuit court summarily denied Hutch's September Petition without a hearing. Hutch filed a Notice of Appeal of this denial on November 25, 1997. The two appeals were consolidated into No. 21159 on May 21, 1998.

POINTS ON APPEAL

Hutch contends that the circuit court erred when it decided that neither the July Petition nor the September Petition stated a colorable claim and summarily denied both petitions without a hearing. More specifically, Hutch contends that the four-year minimum term of imprisonment imposed by the HPA in each of the three cases violated the three plea agreements that induced him to plead guilty and are therefore illegal.

Hutch also contends that HAR § 17-202-1(b) is unconstitutional. HAR § 17-202-1(b) (1983) states that "[m]utual assistance between inmates or wards on legal matters is permitted on a case by case basis at the facility administrator's discretion. There is no absolute right to mutual assistance."

. . . .

DISCUSSION

1.

HRPP Rule 40(a) provides, "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[.]" Thus, Hutch's September Petition is a duplication of his July Petition.

2.

HRS §§ 353-62 and 706-669 (1993) require the HPA to set a minimum term of imprisonment. This minimum term is not a mandatory minimum because the HPA "in its discretion may reduce the minimum term fixed by its order[.]" HRS § 706-669(5).

As noted above, HRS § 706-606.5 requires the circuit court to sentence certain repeat offenders to a mandatory minimum term of imprisonment without possibility of parole during such terms. It does so expressly "[n]otwithstanding section 706-669 [the statute authorizing the HPA to determine minimum terms of imprisonment] and any other law to the contrary[.]"

In Hutch's case, we have a situation where (1) the circuit court is statutorily ordered to impose a mandatory minimum term of imprisonment without possibility of parole during such period; (2) the HPA is statutorily authorized to impose a minimum term of imprisonment; (3) the defendant and the DPA and possibly the court agreed to a mandatory minimum term of imprisonment (Defendant/DPA Agreement); ([4]) the court complied with the Defendant/DPA Agreement; and ([5]) the HPA did not comply with the Defendant/DPA Agreement.

The question is whether the HPA was required to comply with the Defendant/DPA Agreement. Hutch appears to assert the following syllogism: (a) the Defendant/DPA Agreement bound (i) the prosecutor representing the State and (ii) all agencies of the State; (b) the HPA is an agency of the State; and (c) therefore, the Defendant/DPA Agreement bound the HPA. In the words of Hutch's Opening Brief, "There has been a complete lack of mutuality of remedy in [Hutch's] case. Only the [S]tate achieved a bargain in this case. Therefore, [Hutch] . . . must be allowed to withdraw the plea of guilty and go to trial on all three cases."

The flaw in Hutch's syllogism is (a)(ii) above. It appears that Hutch misunderstands HRPP Rule 11 which states in relevant part as follows:

> (e) Plea agreement.
>
> (1) In general. The prosecutor and counsel for the defendant, or the defendant when acting pro se, may enter into plea agreements that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to an included or related offense, the prosecutor will take certain actions or adopt certain positions, including the dismissal of other charges and the recommending or not opposing of specific sentences or dispositions on the charge to which a plea was entered. The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.

In other words, although the DPA represented the prosecutor representing the State and the prosecutor was bound by the Defendant/DPA Agreement, the DPA did not represent the State Court or the State HPA. Only the court could bind itself to the Defendant/DPA Agreement. Assuming the HPA could have bound itself to the Defendant/DPA Agreement, it did not do so.

3.

Hutch contends that HAR § 17-202-1(b) unconstitutionally restricts his ability to challenge his "illegal custody." Hutch argues that this rule has "prevented [him] adequate, effective and

> meaningful access to the courts." In his September Petition, Hutch asserted that he was a "[j]ailhouse lawyer" and that HAR § 17-202-1(b) prohibited him from helping other inmates in their legal matters and from obtaining help for himself from other "jailhouse lawyers." In support of his contention, Hutch cites Johnson v. Avery, 393 U.S. 483 (1969). In Johnson, the State of Tennessee did not "provide an available alternative to the assistance provided by other inmates." Id. at 488. However, in Lewis v. Casey, 518 U.S. 343 (1996), the United States Supreme Court concluded that an inmate must establish a relevant actual injury resulting from a regulation governing legal assistance to inmates. This means that an inmate must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Lewis, 518 U.S. at 351.
>
> We do not reach the merits of Hutch's point because this is an HRPP Rule 40 proceeding, and HRPP Rule 40 does not authorize Hutch to challenge the constitutionality of HAR § 17-202-1(b).
>
> CONCLUSION
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> Accordingly, we affirm both the January 7, 1998 Order denying the July 14, 1997 Petition and the November 7, 1997 Order denying the September 24, 1997 Writ.

(Footnotes omitted.)

On February 4, 1999, Hutch filed a document in the office of the Hawai‘i Supreme Court Clerk. On February 5, 1999, the Hawai‘i Supreme Court entered an order stating as follows:

> Upon consideration of the document titled "Petitioner-Appellants Now Seek The Hawaii Supreme Court To Hear The Matter At Hand", which appears to be an application for writ of certiorari, filed by . . . Hutch, Pro Se, it appears that [Hutch] is represented by counsel, therefore,
>
> IT IS HEREBY ORDERED that the application for writ of certiorari filed by [Hutch] is denied without prejudice to consideration of a subsequent application for writ of certiorari filed by counsel of record.

Counsel for Hutch did not file an application for writ of certiorari until May 4, 1999. On May 7, 1999, the Hawai‘i Supreme Court denied the application on the ground that it was untimely.

On August 11, 1999, Hutch filed an HRPP Rule 40 petition wherein he asserted the following grounds:

(1) Hutch was the victim of the ineffective assistance of counsel regarding his appeals because his counsel failed to timely file an application for writ of certiorari.

(2) HAR § 17-202-1(b) denied Hutch and his fellow inmates their constitutional right to access to the courts.

(3) The HPA did not comply with the prosecutor's plea agreement.

(4) The HPA failed to comply with HRS § 706-669(5) (Supp. 2002) which allows it to reduce the minimum term it previously set.

On December 23, 1999, the court entered its Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Petition for Post-Conviction Relief. In this document, the court set ground (1) for a hearing, but decided that grounds (2), (3), and (4) had previously been finally decided in appeal no. 21159. We affirm this decision and order.

Ground (1) was discussed at circuit court hearings on February 22, 2000, March 6, 2000, and March 14, 2000. The court clerk's minutes of the March 14, 2000 hearing states that "COURT TOOK THE MATTER UNDER ADVISEMENT AND INDICATED THAT HER RULING WILL BE BY WAY OF MINUTE ORDER TO THE PARTIES." On July 26, 2000, the court received a letter from Hutch dated July 20, 2000,

seeking a decision. The court clerk's August 8, 2000 letter to Hutch responded that "enclosed is a copy of a Minute Order regarding the Petition for Post-Conviction Relief." The "Minute Order" referred to is the following language, in relevant part, added to the court clerk's minutes of the March 14, 2000 hearing:[2]

> MINUTE ORDER: AT TERM: 8/8/00
>
> PETITIONER SEEKS POST-PETITION RELIEF PURSUANT TO RULE 40 BASED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE OF APPELLATE COUNSEL TO TIMELY FILE AN APPLICATION FOR WRIT OF CERTIORARI. . . . THE COURT, ACCORDINGLY, DENIES THE PETITION FOR POST-CONVICTION RELIEF IN ITS ENTIRETY.
>
> [THE DEPUTY PROSECUTING ATTORNEY] IS DIRECTED TO PREPARE THE APPROPRIATE FINDINGS OF FACT AND ORDER.

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[2] In this case, the "Minute Order" is really a decision and a directive contained in the court minutes prepared by the clerk of the court and placed in the back of the circuit court record.

Rule 10(a) of the Hawai'i Rules of Appellate Procedure (HRAP) provides that the record on appeal shall consist of the following:

> (1) the original papers filed in the court or agency appealed from;
>
> (2) written jury instructions given, or requested and refused or modified over objection;
>
> (3) exhibits admitted into evidence or refused;
>
> (4) the transcript of any proceedings prepared pursuant to the provisions of Rule 10(b);
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> (5) in a criminal case where the sentence is being appealed, a sealed copy of the presentence investigation report; and
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> (6) the indexes prepared by the clerk of the court appealed from.

In light of HRAP Rule 10(a) quoted above, the "Minute Order" is not a part of the record on appeal. All of the circuit court's decisions, directives, and orders should be made a part of the record on appeal by filing them or orally stating them on the record.

On December 12, 2000, the court entered an Order Denying Defendant's Petition for Post-Conviction Relief concluding that "[t]he trial court does not have the authority or jurisdiction to enter an order extending the expired time for an appeal to the Supreme Court."

In this appeal, Hutch presents the following points on appeal:

1. The December 18, 1996 judgment and the custody of Hutch were illegal because:

(a) Hutch did not understand the plea agreement and the State did not honor the plea agreement;

(b) the circuit court ignored requests by Hutch for documents from the Office of Disciplinary Counsel; and

(c) the circuit court failed to follow the requirement stated in HRS § 660-24 (1993) which pertains to writs of habeas corpus and requires that "the court shall proceed without delay to examine the causes of imprisonment or restraint. The examination may be adjourned from time to time as circumstances may reasonably require."

2. HAR § 17-202-1(b) has hindered Hutch's access to the courts to challenge the illegality of the judgment and his confinement. Hutch argues that if he cannot give help to a fellow inmate, he cannot receive help and, therefore, HAR

§ 17-202-1(b) is unconstitutional. Hutch opines that the HAR § 17-202-1(b) issue should have been remanded back to the circuit court.

3. The circuit court violated Hutch's right to cross-examine adverse witnesses, to offer testimony to reveal the bias and incompetence of his prior counsel, to have his prior counsel present, and to control his own defense.

4. Hutch was denied his request to be heard by the Hawai‘i Supreme Court.

In his opening brief, Hutch states that he "WAS TOLD TO GET APPEALS COUNSEL TO FILE SOMETHING (THE WRIT OF CERTIORARI), THAT [HUTCH'S COUNSEL], FAILED TO DO IN A TIMELY MATTER, YET [HUTCH] DID WRITE IN A TIMELY MATTER!"

5. The Hawai‘i Supreme Court denied Hutch's requests for (a) bail pending appeal, (b) counsel on appeal, (c) transcripts, and (d) copies of documents.

In his opening brief, Hutch states the following:

> CONCLUSION
>
> [HUTCH] SEEKS AN ORDER TO THAT FACT THAT THE HAWAII PAROLING AUTHORITY SHOULD HAVE BEEN HELD TO THE PLEA AGREEMENT, AND ALLOW PETITIONER-APPELLANT TO SUE FOR THE TIME OF INCARCERATION, AND TO ORDER THE HAWAII PAROLING AUTHORITY TO HONOR ALL HRPP RULE 11 PLEA AGREEMENT FROM THE DATE IT SHOULD HAVE HONORED IT IN THIS CASE.
>
> [HUTCH] SEEKS THIS COURT TO ORDER THE LOWER COURT TO TRANSFER THE ISSUE OF THE PRISON RULE HAR§17-202-1(b) TO THE CIVILE DEPARTMENT IN THE LOWER FIRST CIRCUIT COURT AS A CLASS ACTION, TO BRING SUIT TO VINDICATE INMATES RIGHTS OF ACCESS TO THE COURTS, WHICH ARE SIMILARLY SITUATED, AND TO APPOINT COUNSEL.
>
> FOR THIS COURT TO DECLARE THAT [HUTCH] WAS NOT COMPETENT TO ENTER HIS PLEA OF GUILTY. . . .
>
> DELCARE THAT APPEALS COUNSEL OF RECORD DENIED [HUTCH] HIS ADEQUATE, EFFECTIVE, AND MEANINGFUL ACCESS TO THE HIGHER COURT OF THE LAND BY HIS FAILURE TO TIMELY FILE A "WRIT OF CERTIORARI TO

> THE HAWAII SUPREME COURT"; IN A TIMELY MATTER, AND REPRIMAND HIM, AND MAKE ATTORNEYS PAY BACK MONEY RECEIVED FOR INEFFECTIVE ASSISTANCE OF COUNSEL.
>
> TO HAVE THIS HONORABLE COURT RECONSIDERED IT'S OWN DECISIONS TO DENY [HUTCH] BAIL PENDING APPEAL; TO HAVE THIS HONORABLE COURT TO RECONSIDERED THEIR OWN DECISION TO NOT ODER THE PRISON LAW LIBRARY TO MAKE COPIES OF DOCUMENTS FOR INDIGENT PRISONERS; AND/OR WHATEVER THIS HONORABLE COURT MAY DEEM PROPER AND JUST, CONCERNING ALL THE FACTS PRESENTED HEREIN.

(Sics omitted.)

The dispositive issue in this appeal is the issue that arose as follows:

1. On February 5, 1999, the Hawai‘i Supreme Court "ORDERED that the application for writ of certiorari filed by [Hutch] is denied without prejudice to consideration of a subsequent application for writ of certiorari filed by counsel of record."

2. On May 4, 1999, counsel for Hutch filed an application for writ of certiorari. On May 7, 1999, the Hawai‘i Supreme Court denied the application on the ground that it was untimely.

3. On August 11, 1999, Hutch filed a HRPP Rule 40 petition wherein he asserted that he was the victim of the ineffective assistance of counsel regarding his appeals because his counsel failed to timely file an application for writ of certiorari.

4. On December 12, 2000, the circuit court entered an Order Denying Defendant's Petition for Post-Conviction Relief in which it concluded that "[t]he trial court does not have the

authority or jurisdiction to enter an order extending the expired time for an appeal to the Supreme Court."

The question is whether the circuit court was right or wrong when it entered the order described in paragraph 4 above. We conclude that circuit court's decision was right but the reason given for its decision was wrong.

Hutch alleges that he was the victim of the ineffective assistance of counsel because his counsel failed to file a timely application for writ of certiorari. If this had been an appeal from the circuit court, Hutch could not prevail on his allegation that he was the victim of the ineffective assistance of counsel, unless he showed that "an appealable issue [was] omitted as a result of the performance of his" appellate counsel. Briones v. State, 74 Haw. 442, 467, 848 P.2d 966, 978 (1993). In appeals by defendants in criminal cases, an appealable issue "is an error or omission by counsel . . . resulting in the withdrawal or substantial impairment of a potentially meritorious defense." Id. at 465-66, 848 P.2d at 977 (footnote omitted).

Admittedly, the issuance of a writ of certiorari "is a matter within the discretion of the supreme court." Hawai‘i Rules of Appellate Procedure Rule 31(e)(2) (1999) and Rule 40.1(b) (2002). Nevertheless, a writ will not be issued if the record does not show "the withdrawal or substantial impairment of a potentially meritorious defense." Briones, 74

Haw. at 465-66, 848 P.2d at 977 (footnote omitted). In this case, the record fails to contain that necessary showing. Therefore, the allegation by Hutch that the ineffective assistance of counsel denied him a possible discretionary review by the Hawai‘i Supreme Court is not supported by the record.

CONCLUSION

Accordingly, we affirm the circuit court's (1) December 23, 1999 "Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Petition for Post-Conviction Relief" and (2) December 12, 2000 "Order Denying Defendant's Petition for Post-Conviction Relief."

DATED: Honolulu, Hawai‘i, September 13, 2002.

On the briefs:

Eugene James Hutch,
Petitioner-Appellant, *pro se.*

Chief Judge

Bryan K. Sano,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent-Appellee.

Associate Judge

Associate Judge