

NOS. 23983 AND 24098

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

NO. 23983

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

AND

NO. 24098

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

APPEALS FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. No. 00-1-0008
(Cr. No. 92-2513))

MEMORANDUM OPINION

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

Richard Blaisdell (Blaisdell) and the State of Hawai'i (the State) both appeal from the Findings of Fact, Conclusions of Law, and Order (the Order), entered on December 26, 2000 by the Circuit Court of the First Circuit (the circuit court),¹ granting Blaisdell's Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief on grounds of ineffective assistance of appellate counsel.

We conclude that Blaisdell waived his ineffective assistance of appellate counsel claim by failing to raise the

¹ The Honorable Victoria S. Marks entered the order and presided over the proceedings relevant to this appeal.

claim in three prior HRPP Rule 40 petitions. Accordingly, we reverse the Order.

BACKGROUND

A.

On August 20, 1992, in Cr. No. 92-2513, Blaisdell was indicted on twenty-four counts of sexual assault, attempted sexual assault, and terroristic threatening of seven minor girls who were less than fourteen years old (the alleged victims). Blaisdell subsequently moved successfully to sever these counts for trial purposes.

The first jury trial, which related to counts involving three of the alleged victims, resulted in a February 24, 1994 judgment (the First Judgment), convicting and sentencing Blaisdell 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, Blaisdell filed a number of actions:

(1) On February 18, 1994, he filed a 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) On February 18, 1994, he also filed a petition for writ of *habeas corpus* with the United States District Court for the District of Hawai'i (the federal district court), claiming

that his constitutional right to speedy trial was violated. This petition was dismissed on August 23, 1994 for Blaisdell's failure to exhaust state remedies, and on Blaisdell's appeal of that ruling, the dismissal was affirmed by the Ninth Circuit Court of Appeals.

(3) On April 25, 1994, he filed an appeal (No. 18018) from the First Judgment. In the appeal, which was assigned to this court, Blaisdell challenged, as reversible error: (a) the circuit court's denial of his motion to dismiss the indictment for failure to try him within the speedy trial provisions specified in HRPP Rule 48; (b) the circuit court's failure to dismiss the indictment on constitutional speedy trial grounds; (c) the circuit court's failure to *sua sponte* instruct the jury on sexual assault in the fourth degree; (d) the circuit court's denial of his motion for a continuance of trial; (e) the lack of substantial evidence to support the verdict; (f) the circuit court's failure to recuse itself; (g) the circuit court's imposition of a "cruel and unusual" punishment; and (h) the prosecutor's failure to produce exculpatory evidence during discovery. This court affirmed the First Judgment by summary disposition order (SDO) on April 30, 1997.

The second jury trial, which related to the counts involving the four remaining alleged victims, resulted in a March 10, 1995 judgment (the Second Judgment), convicting and

sentencing Blaisdell on 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, Blaisdell filed three actions:

(1) On April 5, 1995, he filed an appeal from the Second Judgment (No. 18881).² The appeal was assigned to this court, which affirmed the Second Judgment by SDO on April 30, 1997.

(2) On May 10, 1996, Blaisdell filed a petition for writ of *habeas corpus* in the federal district court, which dismissed the petition on August 28, 1998 for Blaisdell's failure to exhaust state remedies. The federal district court's dismissal was subsequently affirmed by the Ninth Circuit Court of Appeals on Blaisdell's further appeal.

² In this appeal, Richard Blaisdell (Blaisdell) contended that the Circuit Court of the First Circuit committed reversible error by: (1) denying his motion to dismiss the indictment for prosecutorial misconduct, (2) denying his motion to disqualify the Office of Prosecuting Attorney, (3) denying his constitutional speedy trial and Hawai'i Rules of Penal Procedure (HRPP) Rule 48 motions to dismiss, (4) denying his motion to continue trial date, (5) denying his motion to recuse the trial judge, (6) refusing to exclude the victim-witness "advocate[,]" (7) denying his request for a transcript of a witness's testimony, (8) denying his motion for mistrial, (9) denying his motion for judgment of acquittal, (10) refusing to permit the prosecutor to testify as a defense witness, (11) denying his oral motions to exclude the press and the public from the courtroom and to seal the court's file, (12) allowing improper cross-examination of defense witnesses and admitting hearsay testimony, (13) convicting him when there was a lack of substantial evidence to support the jury's guilty verdicts, and (14) imposing life term sentences.

(3) On December 12, 1997, Blaisdell filed a petition for writ of *habeas corpus* in the federal district court, which dismissed the petition on June 22, 1998 on grounds that Blaisdell, by failing to seek *certiorari* review of this court's affirmances of the judgments of his convictions in the Hawai'i Supreme Court, had failed to exhaust his state court remedies. The federal district court instructed Blaisdell

to seek direct review of his convictions in the Hawaii Supreme Court, or alternatively, to file a claim of ineffective assistance of counsel under Rule 40 of the Hawaii Rules of Penal Procedure.² [Blaisdell] should then refile his petition in federal court after he has exhausted all available state court remedies.

Footnote 2 of the foregoing instruction observed:

[Blaisdell] may be unable to seek direct review of his convictions in the Hawaii Supreme Court because he failed to file a petition for writ of certiorari within ten days of the date of the Intermediate Court of Appeals' decision. If this is the case, [Blaisdell] will have procedurally defaulted on this claim, and he may not seek review of this claim in federal court absent a showing of cause for the procedural default and actual prejudice, or a demonstration that a fundamental miscarriage of justice would occur resulting in the conviction of "one who is actually innocent." Bonin v. Calderon, 77 F.3d 1155, 1158-59 (9th Cir. 1996).

B.

On April 7, 1999, Blaisdell filed in the circuit court three HRPP Rule 40 petitions for post-conviction relief. The first two petitions incorporated the grounds for relief articulated in the third petition, which alleged twenty-nine "facts," nineteen "issues," and numerous arguments as to why

Blaisdell was entitled to HRPP Rule 40 relief. In summary, Blaisdell's arguments were as follows:

(1) Blaisdell was unconstitutionally and illegally indicted because:

(a) 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;

(b) 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";

(c) The police videotapes in which the alleged victims were interviewed about their allegations against Blaisdell were made long after the "scripted" grand jury proceedings;

(c) The "[a]lleged victims were allowed to watch each others [sic] police interviews and were given video tapes of each others [sic] interviews";

(d) 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";

(e) The government bribed the victims to testify falsely against Blaisdell by promising them or their parents that they would receive up to \$10,000 from the Criminal Injuries Compensation Commission if they so testified;

(f) The deputy prosecutor and victim witness advocate falsified applications to the Criminal Injuries Compensation Commission so that the victims could "falsely obtain awards";

(g) The deputy prosecutor, the lead detective, and the alleged victims committed perjury before the grand jury and at trial;

(h) The lead detective falsified information in his investigative report;

(i) 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 [Blaisdell] look guilty, and then pass[ed] these false documents on to all the litigants in the court";

(j) The alleged victims, the investigating detective, and the deputy prosecutor committed perjury;

(k) The detectives, the deputy prosecutor, the court reporter, and others conspired "with the alleged victims and their mothers to convict [Blaisdell] at all costs" by committing felonies against him;

(1) The deputy prosecutor misled the grand jury into believing that the State's witnesses were reliable; and

(m) The State had no jurisdiction to indict Blaisdell "in view of the government misconduct described in [the] writ";

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

(3) There was insufficient evidence to convict Blaisdell.

In an August 5, 1999 Order, the circuit court dismissed Blaisdell's three petitions without conducting an evidentiary hearing, concluding, as a matter of law, that some of the issues raised by Blaisdell had previously been raised and decided, and the remaining issues were "patently frivolous and without a trace of support." Blaisdell filed a timely appeal, and by a Memorandum Opinion dated May 25, 2001, this court affirmed the circuit court's August 5, 1999 Order. Blaisdell did not file an application for writ of *certiorari* with the Hawai'i Supreme Court from this court's memorandum opinion.

C.

On March 14, 2000, Blaisdell filed the HRPP Rule 40 petition that underlies this appeal. In the petition, Blaisdell alleged that the failure of his appellate counsel to file an application for writ of *certiorari* from this court's April 30, 1997 SDOs, affirming Blaisdell's convictions, constituted

ineffective assistance of counsel because such failure prevented Blaisdell from exhausting his state court remedies for purposes of *habeas corpus* review by the federal district court.

At a November 8, 2000 hearing before the circuit court on his petition, Blaisdell testified that it was not until "about the end of the first week of June" 1997, about "six weeks after" this court's April 30, 1997 SDOs had been entered, that he received a letter from his appellate counsel, dated May 19, 1997, stating as follows:

I regret to inform you that during the week of May 7, 1997, I received the attached order affirming the decision of the trial court. Because of our earlier discussions and recent opinions by the Hawaii Supreme Court in cases involving some of the same issues, I saw no ground for reconsideration to the ICA or for certiorari [sic] in the State System. It appears now that your federal habeas [sic] action is ripe.

Blaisdell testified that when he received the letter he "was upset and [he] immediately filed a habeas corpus in the Hawaii Supreme Court 'cause [he] knew you had to do -- you had to present it before the Hawaii Supreme Court before you could put it in the federal court. And [he] didn't want to take any chances." According to Blaisdell, this *habeas corpus* petition, which the supreme court subsequently denied,³ raised the same issues that he "was going to present to the federal court, that

³ It appears from the record on appeal that the Hawai'i Supreme Court, by an order filed on October 13, 1997, denied Blaisdell's petition for writ of *habeas corpus* "without prejudice to a petition filed in accordance with the provisions of Rule 40 of the [HRPP] in the court in which the convictions took place."

was everything that was in the appeals as well as the newly-discovered evidence of all the whispering that was going on in the police interviews."

At the hearing, Blaisdell's appellate counsel explained why he had not filed an application for writ of *certiorari* from this court's April 30, 1997 SDOs:

[Blaisdell] didn't want to. He felt the whole state -- if there was another way to do this that he would rather go any other way than wait around for a writ of certiorari to be held against him. And because of those cases we were talking about earlier that I don't remember, but they weren't going very well for child molesters and other sex offenders in the state, he didn't want to take a chance at getting a full-blown opinion written against him when he had this postcard denial or the summary disposition order.

Blaisdell's appellate counsel had previously explained in a written letter to Blaisdell's counsel during the proceedings below that

Prior to the ICA's decision on April 30, 1997, [Blaisdell] was adamant about raising claims which were not developed by the trial or direct appeal. This included a conspiracy by the Court Reporters to alter the trial record. Additionally he wanted to do his own federal habeas, if no one could be appointed for him.

We had numerous discussions about preserving all of his claims for his federal habeas prior to April 30, 1997. Based upon those discussions we agreed that unless something unusual happened, not to petition for discretionary review before the Hawaii Supreme Court.

The main reason for these discussions is (1) that [Blaisdell] claimed to be developing forensic proof that trial witnesses were coached to lie by the State and

(2) that his brother and others were helping him and needed more time. . . .

The other reason is that [Blaisdell] was aware that federal habeas law may require him to seek federal relief within a year after his claims were exhausted at the State level. 28 U.S.C. 2244(d)(1)(A). The one-year grace period for the effective date of this limitation period ended April 23, 1997. Two Rivers v. Lewis, 174 F.3d 987, 996 (9th Cir. 1999). The ICA decision against [Blaisdell] was filed a few days later on April 30, 1997.

As you can see, [Blaisdell's] investigative efforts were ongoing, nearly two years after the ICA ruled. . . . These efforts did not seem to toll the one-year limitation period in which to bring his federal habeas case. The period of limitations would be running as soon as the State Supreme Court was done with discretionary review (certiorari). Arguably and to be on the safe side, the time period was running even after the ICA ruled, making these claims ripe. This was due to a circuit split at the time.

Since some of the federal claims Blaisdell contemplated bringing were going to be dismissed if he filed a federal habeas too early, he wanted to exhaust them as well -- as soon as his independent investigation . . . was concluded. Because of this, I relied on Russell v. Rolfe, 893 F.2d 1033 (9th Cir. 1990). There, a petitioner exhausted his state remedies by both a direct appeal and, as to unexhausted claims, by a collateral proceeding similar to HRPP Rule 40, in Hawaii.

Our plan was to exhaust all claims by HRPP 40 even though some of them were raised and decided before by the ICA. As to those claims decided earlier, they would be res judicata under HRPP 40(b)(3) but not precluded from federal habeas rule. At the time the 9th Circuit had ruled on claims raised and decided by a State court even though res judicata was invoked on the State post conviction review. Le Page v. Idaho, 851 F.2d 251, 256-57 (9th Cir. 1988).

In other words, the appellate counsel's position was that, strategically, Blaisdell needed as much time as possible to produce forensic evidence showing that he had been wrongfully convicted, and, therefore, the plan was to draw the process out

to give Blaisdell a chance to file a writ of *habeas corpus* in federal district court. As the appellate counsel testified:

. . . there was also nothing to prevent [Blaisdell] from not taking certiorari and going, raising all of his claims again that he raised at the ICA, raise them at Rule 40, take the Rule 40 to the Supreme Court, the new court seeing the claims that the ICA had seen, and at that time everything would be exhausted. And I assume that's what he's still doing.

On December 26, 2000, the circuit court filed its Order, concluding, in relevant part, that:

10. "An applicant for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. [§] 2254(b)(1)(A)

11. Filing an application for a writ of certiorari in the Supreme Court of Hawai'i after the ICA has issued its opinion is an available remedy in the courts of the State of Hawai'i. . . .

. . . .

15. [Blaisdell's appellate counsel's] errors reflect a lack of judgment, a lack of skill and/or a lack of diligence required of an attorney practicing criminal law in the State of Hawai'i. *State v. Aplaca*, 74 Haw. 54, 66-67, 837 P.2d 1298, 1305 (1992).

16. [Blaisdell's appellate counsel] provided erroneous legal advice to [Blaisdell] which resulted in misinforming [Blaisdell] of the procedure necessary to have [Blaisdell's] claims that were raised on direct appeal properly preserved for review by the Federal District Court. . . .

17. As it pertains to exhausting all state remedies as required by 28 U.S.C. § 2254, [Blaisdell] did not receive effective assistance of counsel as guaranteed by the 6th amendment of the U.S. constitution and article 1, section 14 of the Hawai'i State constitution.

18. Direct review of [Blaisdell's] claims formerly ruled upon by the ICA are barred by a procedural default

that prevents review by the Supreme Court of Hawai'i, *i.e.*, [Blaisdell] failed to apply for a writ of certiorari within 30 days of the ICA's decision. [HRS §] 602-59

19. This procedural default was caused by [Shaw's] ineffective assistance of counsel upon which [Blaisdell] relied.

20. [Blaisdell] has been actually prejudiced by [Shaw's] ineffective assistance of counsel, *i.e.*, he has had a fundamental right to effective assistance of counsel striped [sic] away and his statutory right to have his federal claims reviewed by the federal court denied.

DISCUSSION

Pursuant to HRPP Rule 40(a)(3):

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.

In Stanley v. State, 76 Hawai'i 446, 450, 879 P.2d 551, 555 (1994), the Hawai'i Supreme Court noted that

HRPP Rule 40(a)(3) restricts the issues that may be raised in a post-conviction proceeding and provides in pertinent part that "[s]aid proceeding 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."

In Stanley, the petitioner for HRPP Rule 40 post-conviction relief had previously appealed his convictions for reckless endangering in the first degree, attempted murder in the first degree, attempted manslaughter, and place to keep firearm on four

grounds: (1) erroneous attempted first degree murder and attempted manslaughter instructions, (2) improper comment by the deputy prosecutor during closing rebuttal argument, (3) insufficiency of the evidence to support the attempted first degree murder conviction, and (4) unlawful imposition of the sentence of life imprisonment without the possibility of parole for the attempted first degree murder conviction. The supreme court held that, for HRPP Rule 40 purposes, the petitioner had waived the issue of sufficiency of the evidence to support the attempted manslaughter conviction because the petitioner had failed to: raise this issue on appeal; present any facts to rebut the presumption that the failure to raise the issue was made knowingly; and prove the existence of extraordinary circumstances to justify his failure to raise the issue. Id. at 451, 879 P.2d at 556.

In this case, the federal district court, in dismissing Blaisdell's December 12, 1997 petition for federal *habeas corpus* relief on grounds that Blaisdell had failed to seek *certiorari* review of this court's April 30, 1997 SDOs affirming Blaisdell's convictions, specifically instructed Blaisdell to either seek direct review of his convictions with the supreme court, or "alternatively, to file a claim of ineffective assistance of counsel under [HRPP] Rule 40[.]" Additionally, the supreme court, by an October 13, 1997 order, dismissed Blaisdell's

earlier petition for a writ of *habeas corpus* "without prejudice to a petition filed in accordance with the provisions of [HRPP] Rule 40[.]" While Blaisdell thereafter filed three HRPP Rule 40 petitions for post-conviction relief in the circuit court on April 7, 1999, none of them alleged a claim of ineffective assistance of appellate counsel. Moreover, Blaisdell has not proved or even alleged the existence of extraordinary circumstances to justify his failure to raise the ineffective assistance of counsel issue in his three petitions for post-conviction. In light of HRPP Rule 40(a)(3) and Stanley, we conclude that Blaisdell waived this issue and the circuit court therefore erred in granting Blaisdell's March 14, 2000 HRPP Rule 40 petition.

Accordingly, we reverse the circuit court's December 26, 2000 Order.

DATED: Honolulu, Hawai'i, November 27, 2002.

On the briefs:

Dana S. Ishibashi for
Richard Blaisdell.

James M. Anderson, Deputy
Prosecuting Attorney, City
and County of Honolulu, for
the State of Hawai'i.