NO. 24351

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

KYONG HYON PAEK, Petitioner-Appellant, v.
STATE OF HAWAIʻI, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 00-01-0022)

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

Petitioner-Appellant Kyong Hyon Paek (Paek) appeals from the May 16, 2001 "Decision and Order Denying Petition for Post-Conviction Relief Without a Hearing" (Decision and Order), entered by Judge Richard K. Perkins, on the grounds that the Circuit Court of the First Circuit, State of Hawaiʻi (circuit court), erred when it ruled on Paek's ineffective assistance of counsel claim without holding an evidentiary hearing on the matter. We affirm.

BACKGROUND

On July 18, 1996, a grand jury of the circuit court indicted Paek on one count of Promoting a Dangerous Drug in the Second Degree (PDD 2), Hawaii Revised Statutes (HRS) § 712-1242(1)(c) (1993 and Supp. 1996)[1], and one count of Promoting a Dangerous Drug in the First Degree (PDD 1), HRS

[1] Hawaii Revised Statutes (HRS) § 712-1242(1)(c) (1993 and Supp. 1996) states, in relevant part, as follows: "A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly: . . . [d]istributes any dangerous drug in any amount."

§ 712-1241(1)(b)(ii)(A) (1993 and Supp. 1996)[2]. On September 3, 1996, the circuit court appointed an attorney to represent Paek "at all stages of proceedings, including appeal, if any[.]"[3] The court's "Memorandum of Pretrial" filed on September 12, 1996, noted "Entrapment" as one of the "DEFENSE/ISSUES" in the case.

On October 3, 1996, the following met for a trial status conference: Judge Victoria S. Marks, a deputy prosecuting attorney (DPA), and Paek's attorney. At the conference, Paek's attorney informed the court that (1) although Paek was a fifteen-year resident, Paek is a Korean immigrant who can be deported and (2) he would be moving for a continuance because (a) he was recently appointed to represent Paek and (b) he received discovery in September. The DPA requested that Paek's trial be continued to precede or trail the DPA's "Motonaga" case,

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[2] HRS § 712-1241 (1993 and Supp. 1996) states, in relevant part, as follows:

> (1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:
>
> . . . .
>
> (b) Distributes:
>
> . . . .
>
> (ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:
>
> (A) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers[.]

[3] Petitioner-Appellant Kyong Hyon Paek (Paek) received court-appointed counsel because the Office of the Public Defender represented Paek's co-defendant, Sumi Lee.

which was firm set for January 20, 1997, because the Paek and Motonaga cases required the testimony of a confidential informant living on the Mainland. The circuit court informed both attorneys that the firm set calendar for the requested weeks was full.

On October 4, 1996, Paek's attorney filed a "Motion to Continue Trial to Firm Trial Date and Extend Time to File Pretrial Motions" on the grounds that:

- [Paek's] present counsel was appointed September 3, 1996;
- The Prosecution provided discovery September 12, 1996;
- Counsel has been in a jury trial for the past week; and
- Additional time is needed to investigate the case, prepare relevant pretrial motions, and prepare a trial defense.

On October 21, 1996, following a hearing on October 8, 1996, the circuit court ordered Paek's trial week to be continued to March 3, 1997. The court's "Memorandum of Pretrial" filed on February 27, 1997, noted "Entrapment" as one of the "DEFENSE/ISSUES" in the case.

On March 5, 1997, Paek's case proceeded to a jury trial in the court of Judge Perkins. Paek's witness list filed in open court on March 5, 1997, named Respondent-Appellee State of Hawai‘i's (the State) confidential informant (CI) as one of the possible witnesses for the defense.

At trial, the State called CI, a 30-year-old male, to testify. CI testified that he had known Paek "[g]oing on a

little bit, three years now." CI testified that prior to February 14, 1995, Paek mentioned "he had product [methamphetamine] for sale, and he needed to make some cash." CI told Paek he "didn't have any money, but [he] would have to check to see if somebody wanted [the methamphetamine]." CI called Detective Michael Church (Detective Church) of the narcotic vice division of the Honolulu Police Department (HPD vice) and informed Detective Church about his conversation with Paek.

After meeting with Detective Church, CI called Paek and arranged a purchase of methamphetamine. On or about February 14, 1995, and March 1, 1995, CI and HPD vice officers purchased methamphetamine from Paek and his girlfriend, Sumi Lee.

At the end of direct examination, CI testified, in relevant part, as follows:

> Q. At any time during the February 14th . . . transaction and the . . . March 1st transaction, did you threaten [Paek] either on tape or off tape?
>
> A. No, sir.
>
> Q. Coerce [Paek] in any way?
>
> A. No, sir.
>
> Q. Trick [Paek] into selling you drugs?
>
> A. No, sir.
>
> Q. When you [CI] called Detective Church that first time on February 14th right after you got a hold of [Paek], or you and [Paek] talked?
>
> A. Yes.
>
> Q. Did you do that on your own free will?
>
> A. Yes, I did.

> Q. Did you volunteer to do this?
>
> A. Yes, I did.
>
> Q. Were you threatened by anyone to call Detective Church or cooperate with the police?
>
> A. No, sir.
>
> Q. Anyone promise you anything?
>
> A. No, sir.
>
> Q. Receive any payment of any sort for this?
>
> A. No.
>
> Q. Why did you call Detective Church and cooperate?
>
> A. It's hard to put in, you know, so many feelings into such little words. From where I was sitting and the misery that methamphetamine has caused, I felt that I was in a position to do something about it. A lot of people that just got totally screwed.

On cross-examination by defense counsel, CI testified that he had no aliases or assumed names and received no formal training from the Honolulu Police Department (HPD). CI further testified, in relevant part, as follows:

> Q. Have you ever been arrested?
>
> A. Once.
>
> Q. By [HPD]?
>
> A. Yes.
>
> Q. And what was that for?
>
> A. An open container at the beach when I was eighteen.

When asked, "[Y]ou ever smoke illegal drugs with [Paek]," CI responded, "No, sir." When questioned about his contact with HPD prior to February 14, 1995, CI testified that when he was a manager for a bar, "[f]rom time to time [Detective Church] would come and ask [him] questions. . . about the flow of drugs, if

there was a lot of drugs floating around, a lot of people selling." CI further testified that he made seven or eight purchases of drugs from three individuals "all with Detective Church[.]" The first of these purchases occurred "[a]bout five months prior" to February 14, 1995.

On March 13, 1997, a jury found Paek guilty of PDD 2 and PDD 1. The Judgment was entered on May 2, 1997. On May 9, 1997, Paek filed a notice of appeal. On November 13, 1997, the Hawai‘i Supreme Court approved and ordered a Stipulation to Withdraw Appeal.

On June 13, 2000, pursuant to Rule 40 of the Hawai‘i Rules of Penal Procedure (HRPP), Paek filed a "Petition for Post-Conviction Relief" (Rule 40 Petition). In it, Paek asserted, in relevant part, as follows:

> A. Ground one: Denial of Effective Assistance of Counsel
>
> . . . .
>
> Counsel failed to advise Petitioner of deportability status by going to trial. Counsel failed to adequately investigate defenses and witnesses of case and did not raise these issues pre-trial nor at trial.

On October 23, 2000, Paek filed "Petitioner's Reply Memorandum to the State of Hawai‘i's Answer to Petition for Post-Conviction Relief." In it, Paek clarified his Rule 40 Petition, in relevant part, as follows:

> In this case the Indictment was obtained in large part due to the actions of a confidential informant ("CI"). The informant was the sole contact with [Paek] in soliciting [Paek] into . . . procuring the drugs in question, and appeared at trial as the key State witness.

> At no time prior to trial did counsel move for pretrial disclosure of the CI's identity, the existence of any agreements with the CI for monetary compensation or leniency in a criminal case, the CI's prior criminal record, the CI's prior track record as an informant and other relevant information to be used in cross examining the CI at trial.
>
> Counsel should have been aware of the need to get pretrial disclosure of this information at the pretrial conference held in 1996 when the prosecutor . . . requested a firm trial date because the CI in [Paek's] case . . . was also a CI in another case and the State wanted to set those cases back to back [sic] so as to transport the CI in one trip for the two cases.

On May 16, 2001, Judge Perkins entered the Decision and Order. In the "Discussion" part of the Decision and Order, Judge Perkins stated, in relevant part, as follows:

> [Paek] claims that his counsel was ineffective in failing to adequately investigate defenses and witnesses and raise certain issues (which he does not clearly identify), but cites no facts suggesting that the withdrawal or substantial impairment of a potentially meritorious defense resulted from any of these alleged failings. [Paek's] conclusory allegations are not sufficient to establish a colorable claim.

(Citations omitted.) Paek's timely Notice of Appeal followed.

POINT OF ERROR

On appeal, Paek contends that

> [t]he trial court should have held an evidentiary hearing on [Paek's] Rule 40 Petition for Post-Conviction Relief on the issue of ineffective assistance of counsel, where no pre-trial motion to disclose the background and/or agreements or documents executed by the CI was filed nor requested during trial upon counsel learning of the CI's past history in cooperating with the police.

We disagree.

RELEVANT RULE

HRPP Rule 40(f) provides, in relevant part, as follows:

> 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.

STANDARDS OF REVIEW

A.

Denial of HRPP Rule 40 Petition
Without Evidentiary Hearing

The Hawai‘i Supreme Court has stated that

> [a]s a general rule, a hearing should be held on a Rule 40 petition for post-conviction relief where the petition states a colorable claim. To establish a colorable claim, the allegations of the petition must show that if taken as true the facts alleged would change the verdict, however, a petitioner's conclusions need not be regarded as true. Where examination of the record of the trial court proceedings indicates that the petitioner's allegations show no colorable claim, it is not error to deny the petition without a hearing. *The question on appeal of a denial of a Rule 40 petition without a hearing 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.*
>
> [In this regard], the 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*. Therefore, we hold that . . . the issue whether the trial court erred in denying a Rule 40 petition without a hearing based on no showing of a colorable claim is reviewed *de novo*; thus, the right/wrong standard of review is applicable.

Barnett v. State, 91 Hawai‘i 20, 26, 979 P.2d 1046, 1052 (1999) (ellipsis and emphasis in original; citations, internal citations and internal quotation marks omitted).

B.

Ineffective Assistance of Counsel

"In assessing claims of ineffective assistance of counsel, the applicable standard is whether, viewed as a whole,

the assistance provided [was] within the range of competence demanded of attorneys in criminal cases." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (internal quotation marks and citation omitted).

DISCUSSION

In his opening brief, Paek argues that

> counsel should have been aware after the October, 1996 pre-trial conference that there was a possible agreement between the CI and the State. The fact that the CI was involved in another case and was being flown in from the mainland [sic] to testify raises the distinct possibility that:
>
> 1) the CI had himself been arrested for drug offenses and was cooperating with the police and State in order to avoid prosecution or to receive leniency in being prosecuted based on his performance as a CI, and/or
>
> 2) the CI had been threatened with prosecution unless he cooperated and in doing so would receive compensation of some form.

In other words, Paek's argument is that: (1) the prosecution's case depended upon the credibility of CI, (2) Paek could not raise a reasonable doubt without introducing evidence negativing CI's credibility, and (3) CI had a relationship with the police suggesting a possibility that CI had a selfish motive for cooperating with the police and testifying in favor of the prosecution.

As noted above, however, HRPP Rule 40(f) states that "[i]f a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing[.]" Paek's allegation "that there was a possible agreement between the CI and the State" does not satisfy HRPP Rule 40(f)'s requirement.

As noted by Judge Perkins, "[Paek] claims that his counsel was ineffective in failing to adequately investigate defenses and witnesses . . . , but cites no facts suggesting that the withdrawal or substantial impairment of a potentially meritorious defense resulted from any of these alleged failings." Unless and until Paek's petition "alleges facts that if proven would entitle [Paek] to relief," Paek does not have a right to a hearing.

CONCLUSION

Accordingly, the May 16, 2001 "Decision and Order Denying Petition for Post-Conviction Relief Without a Hearing" is affirmed.

DATED: Honolulu, Hawai‘i, March 21, 2003.

On the briefs:

Colin K. Kurata
for Petitioner-Appellant. Chief Judge

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

Associate Judge