

NO. 24421

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

EDUARDO CALIBUSO, Petitioner-Appellant, v.  
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(S.P.P. NO. 01-1-0001(2))

MEMORANDUM OPINION

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

Petitioner-Appellant Eduardo Calibuso, also known as "Eddie" (Calibuso), appeals from the June 13, 2001 "Findings of Fact, Conclusions of Law, and Order Denying Petitioner's Petition to Vacate, Set Aside, or Correct Judgment, Filed On January 16, 2001" (June 13, 2001 Order) on the grounds that the circuit court reversibly erred when it (1) ruled on Calibuso's petition without giving him a hearing on the matter and (2) decided that Calibuso had waived his right to appeal the March 15, 1988 judgment of conviction. We vacate the June 13, 2001 Order and remand with instructions.

BACKGROUND

On August 7, 1987, a grand jury of the Circuit Court of the Second Circuit indicted Calibuso on two counts of Promoting a Detrimental Drug in the Second Degree (PDD 2), Hawaii Revised

Statutes (HRS) § 712-1248(1)(d)<sup>1</sup>, and one count of Promoting a Detrimental Drug in the First Degree (PDD 1), HRS § 712-1247(1)(f)<sup>2</sup>. At arraignment on August 26, 1987, Calibuso pled not guilty and requested a jury trial.

Calibuso's first jury trial began on November 2, 1987. Judge Richard R. Komo presided. During the trial, on November 4, 1987, defense counsel moved for a mistrial. After considering the arguments, the court granted the motion.

On November 9, 1987, defense counsel filed a "Motion to Modify Terms and Conditions of Supervised Release." In his motion, defense counsel requested court permission to allow Calibuso to travel to California and Nevada to visit relatives and find possible employment. At the hearing on the motion on November 17, 1987, the court orally granted the motion.

On January 11, 1988, Calibuso's second trial began. Again, Judge Komo presided. On January 13, 1988, the jury found Calibuso guilty of one count of PDD 2 and one count of PDD 1. On March 15, 1988, Judge Komo sentenced Calibuso to five years of probation and one year in jail.

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<sup>1</sup> Hawaii Revised Statutes (HRS) § 712-1248(1)(d) (1993) provides, in relevant part, that a "person commits the offense of promoting a detrimental drug in the second degree if the person knowingly . . . [d]istributes any marijuana or any Schedule V substance in any amount."

<sup>2</sup> HRS § 712-1247(1)(f) (Supp. 1986) provides, in relevant part, that "[a] person commits the offense of promoting a detrimental drug in the first degree if the person knowingly . . . [d]istributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more, containing any marijuana[.]"

On January 16, 2001, pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP), Calibuso filed a "Petition To Vacate, Set Aside or Correct Judgment" (Rule 40 Petition). In his Rule 40 Petition, Calibuso asserted, in relevant part, as follows:

11. GROUND FOR THE INSTANT PETITION: Ineffective Assistance of counsel. My trial attorney never informed me of any potential plea agreement. I have recently been informed that because of the nature and extent of my convictions, my status in this country is jeopardized. My attorney never even inquired about my immigration status. In addition my attorney never informed me of my right to appeal my convictions.

On June 13, 2001, without a hearing, Judge Shackley F. Rafetto entered "Findings of Fact, Conclusions of Law, and Order Denying Petitioner's Petition to Vacate, Set Aside or Correct Judgment, Filed on January 16, 2001" (Denial Order).

In the "Findings of Fact" part of its Denial Order, the court stated, in relevant part, as follows: "Prior to filing the instant Petition, Petitioner never appealed his case nor challenged any aspect of his convictions in Cr. No. 87-0198(3)."

In the "Conclusions of Law" part of its Denial Order, the court stated, in relevant part, as follows:

1. Under H.R.P.P. Rule 40(a)(3), relief is not available where the issues presented have been previously ruled upon or were waived. An issue is waived if the petitioner knowingly and understandingly failed to raise it at trial, on appeal or in any other proceedings actually conducted, or in a prior proceeding actually initiated under Rule 40. There is a rebuttable presumption that failure to appeal or to raise an issue is a knowing, understanding failure. A petitioner may avoid the waiver rule only by alleging and proving the existence of extraordinary circumstances justifying his failure to raise an issue.

2. The Hawaii Intermediate Court of Appeals has interpreted Rule 40(a)(3) of the Hawaii Rules of Penal Procedure

to mean that an issue is deemed waived if it was not raised at any time prior to the petition. Briones v. State, 74 Haw. 442, 461, 848 P.2d 966, 981 (1993).<sup>3</sup>

3. With respect to [Calibuso's] sole claim/ground of ineffective assistance of counsel, [Calibuso] could and should have raised these grounds [of ineffective assistance of counsel] previously. [Calibuso] has failed to prove the existence of extraordinary circumstances justifying his failure to raise these issues. [Calibuso], therefore, failed to rebut the presumption that his failure to raise these issues are a knowing and understanding failure. [Calibuso's] grounds, therefore, are denied outright based upon [Calibuso's] failure to properly raise these issues previously, and the issues are waived.

. . . .

6. To answer the question of whether assistance was within an acceptable range of competence, [Calibuso] must (1) show specific errors or omissions of counsel reflecting lack of skill, judgment or diligence, and which (2) resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. . . .

. . . .

8. [Calibuso] has failed to meet his burden on his ineffective assistance of counsel claim. [Calibuso] cannot point to any specific error or omission on the part of his prior attorneys [sic] which resulted in the withdrawal or substantial impairment of a meritorious defense.

. . . .

11. Accordingly, this Court concludes, there is no support for the Petition's allegations in the record or other evidence submitted by [Calibuso], and [Calibuso] has failed to state any colorable claims entitling him to an evidentiary hearing.

(Footnote added.)

## STANDARDS OF REVIEW

### A.

#### Ineffective Assistance of Counsel

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

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<sup>3</sup> This paragraph erroneously cites to Briones v. State, 74 Haw. 442, 461, 848 P.2d 966, 981 (1993), which is a Hawaii Supreme Court opinion. The correct cite is to Bryant v. State, 6 Haw. App. 331, 334, 720 P.2d 1015, 1018 (1986).

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).

B.

Denial of HRPP Rule 40 Petition  
Without Evidentiary Hearing

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. . . . [T]he 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 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).

## DISCUSSION

### A.

#### Waiver of Right to Assert Ineffective Assistance of Counsel

HRPP Rule 40(a)(3) (2002) states, in relevant part, as follows:

Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised . . . 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 Matsuo v. State, 70 Haw. 573, 778 P.2d 332 (1989), the Hawai'i Supreme Court stated that "[i]n a proceeding for post-conviction relief, where there has been no realistic opportunity for a defendant to raise an ineffective assistance of counsel claim, this issue is not waived and the defendant is entitled to an opportunity to be heard on the ineffective assistance of counsel claim." Matsuo, 70 Haw. at 577, 778 P.2d at 334.

Nothing on the record supports the conclusion that Calibuso had a realistic opportunity to raise an ineffective

assistance of counsel claim before the January 16, 2001 Rule 40 Petition. The mere passage of time is insufficient.

B.

#### Ineffective Assistance of Counsel

[T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

Barnett, 91 Hawai'i at 27, 979 P.2d at 1053 (ellipsis in original, citations and internal quotation marks omitted). "An accused's potentially meritorious defenses include the assertion of constitutional rights." Briones v. State, 74 Haw. 442, 462, 848 P.2d 966, 976 (1993) (citations and internal quotation marks omitted).

Taking the allegations raised in Calibuso's Rule 40 Petition to be true, Barnett, 91 Hawai'i at 26, 979 P.2d at 1052, the facts are as follows:

1. Calibuso's trial attorney never informed him of any potential plea agreements.
2. Calibuso's trial attorney never inquired into Calibuso's immigration status, and Calibuso's status in the United States has been jeopardized because of his past convictions.
3. Calibuso's trial attorney never informed Calibuso about his right to appeal his convictions.

The question is whether Calibuso's petition alleged, as required by Barnett, "that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."

Regarding 1 and 2, the answer is no. Calibuso's allegation is insufficient. Calibuso did not allege the existence of any potential plea agreements or that there was any way other than an acquittal for Calibuso's status in the United States not to be jeopardized. Defense counsel was not required to inform Calibuso of something that did not exist or could not be changed. Absent the alleged existence of "any potential plea agreements" that might have changed, or had the ability to change, Calibuso's being "jeopardized" because of his past convictions, Calibuso's allegation, if proved, would not satisfy the second part of his Barnett burden.

Regarding 3, this court has noted that

[t]he Hawai'i Supreme Court has recognized that every criminal defendant who deems himself or herself aggrieved by a district or circuit court judgment of conviction has a statutory right to file an appeal and a due process and equal protection right to effective assistance of counsel to prosecute that appeal. . . . The [Hawai'i] supreme court has also acknowledged that the failure of a court-appointed counsel to file a notice of appeal constitutes ineffective assistance of counsel. State v. Caraballo, 62 Haw. 309, 313-14, 615 P.2d 91, 95 (1980)).

Carvalho v. State, 81 Hawai'i 185, 192, 914 P.2d 1378, 1385 (App. 1996), overruled on other grounds by In re Attorney's Fees of Mohr, 97 Hawai'i 1, 32 P.3d 647 (2001).



Calibuso has not alleged, and the record does not show, that defense counsel was court appointed. It appears that defense counsel was not court appointed. However, Calibuso has alleged that defense counsel's failure of his duty with respect to Calibuso's right to appeal his March 15, 1988 conviction caused Calibuso not to file the appeal.

#### CONCLUSION

Accordingly, we vacate the June 13, 2001 "Findings of Fact, Conclusions of Law, and Order Denying Petitioner's Petition to Vacate, Set Aside or Correct Judgment, Filed On January 16, 2001," remand this case to the Circuit Court of the Second Circuit, and instruct the Circuit Court of the Second Circuit to conduct a hearing to allow Calibuso the opportunity to prove that ineffective assistance of counsel was a cause of the fact that Calibuso did not appeal the March 15, 1988 judgment. If the answer is no, Calibuso's motion shall be denied. If the answer is yes, Calibuso's motion shall be granted and Calibuso shall be allowed an opportunity to appeal the March 15, 1988 judgment.

DATED: Honolulu, Hawai'i, December 3, 2002.

On the briefs:

Kyle B. Coffman  
for Petitioner-Appellant.

Chief Judge

Mark R. Simonds,  
Deputy Prosecuting Attorney,  
County of Maui,  
for Respondent-Appellee.

Associate Judge

Associate Judge