NO. 24820

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

WOLFGANG EISERMANN, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 01-01-0018)

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

Petitioner-Appellant Wolfgang Eisermann (Eisermann) appeals from the October 3, 2001 "Findings of Fact, Conclusions of Law and Order" entered by Judge Virginia Lea Crandall denying, without a hearing, his May 2, 2000 Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 "Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner From Custody" (May 2, 2000 HRPP Rule 40 Petition) and the September 11, 2000 "Addendum to Petition for Rule 40 Post-Conviction Relief" (September 11, 2000 Addendum). We affirm.

BACKGROUND

At his trial and on his HRPP Rule 35 motion, Eisermann was represented by attorneys James Miura and Jerry Villanueva.

On his first appeal (No. 18566), after his trial, Eisermann was represented by Donald Wilkerson with Reinhard Mohr on the brief. In a memorandum opinion filed on April 24, 1997, this court affirmed

> the circuit court's October 21, 1994 judgment convicting defendant Wolfgang Eisermann of Counts 1 through 3, Sexual Assault in the First Degree, Hawai'i Revised Statutes (HRS) § 707-730(1)(a); Count 4, Attempted Sexual Assault in the First Degree, HRS §§ 707-500 and 707-730(1)(a); Count 5, Kidnapping, HRS § 707-720(1)(d); and Counts 6 through 9, Sexual Assault in the Third Degree, HRS § 707-732(1)(e).

On his second appeal (No. 22407), after his HRPP Rule 35 motion was denied, Eisermann represented himself. In a memorandum opinion filed on March 6, 2000, this court affirmed the circuit court's March 19, 1999 "Findings of Fact, Conclusions of Law and Order Summarily Denying Defendant's Motion for Rule 35 Relief from Illegal Sentence, Filed on February 23, 1999, Without a Hearing." In that memorandum opinion, this court quoted those findings of fact, in relevant part, as follows:

> FINDINGS OF FACT
>
> 1. On November 27, 1991, the grand jury indicted Eisermann for the following:
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> Counts 1 through 3: Sexual Assault in the First Degree, in violation of Hawai'i Revised Statutes (HRS) § 707-730(1)(a) (1993):
>
> Count 1: Finger in complainant's vagina.
> Count 2: Mouth on complainant's vagina.
> Count 3: Finger in complainant's vagina.
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> Count 4: Attempted Sexual Assault in the First Degree, in violation of HRS §§ 705-500 and 707-730(1)(a): Attempt to knowingly subject complainant to an act of sexual penetration by strong compulsion.
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> Count 5: Kidnapping, in violation of HRS § 707-720(1)(d): Restraining complainant with intent to inflict bodily injury on complainant or subject complainant to a sexual offense.
>
> Counts 6 through 9: Sexual Assault in the Third Degree, in violation of HRS § 707-732(1)(e):
>
> Count 6: Hand on complainant's breast.
> Count 7: Hand on complainant's breast
> Count 8: Mouth on complainant's breast.
> Count 9: Placing complainant's hand on his penis. . . .

2. Each count of the indictment alleged that the charged offense took place on or about July 4, 1991.

3. Following a jury trial, Eisermann was found guilty as charged: Counts 1 through 3, Sexual Assault in the First Degree; Count 4, Attempted Sexual Assault in the First Degree; Count 5, Kidnapping; and Counts 6 through 9, Sexual Assault in the Third Degree.

4. The judgment was filed on October 21, 1994. . . . Eisermann was sentenced to incarceration of twenty years for each of Counts 1 through 4, ten years for Count 5, and five years for each of Counts 6 through 9, all terms to run concurrently.

5. Eisermann filed his notice of appeal on November 22, 1994.

6. The Intermediate Court of Appeals (ICA) entered a memorandum opinion on April 25, 1997. . . . The opinion indicates that Eisermann's two points on appeal argued insufficiency of the evidence to support the guilty verdicts.

7. On June 9, 1997, the ICA entered a notice and judgment on appeal, affirming the circuit court's October 21, 1994 judgment. . . .

8. Eisermann's [Motion for [HRPP] Rule 35 Relief From Illegal Sentence] was filed on February 23, 1999. In his motion, Eisermann, citing HRS § 701-109, argues that he was improperly sentenced for nine separate offenses that stemmed from "the commission of the same crime." Eisermann contends that the nine offenses with which he was charged share the same elements, and that pursuant to HRS § 701-109 he can only be convicted of one of these offenses because the other eight are lesser included offenses. Eisermann does not identify which eight offenses are lesser included.

9. Eisermann further contends that "the conviction for eight of the offenses must be reversed and the lesser offense applied as a sentence," and urges this court to reduce the sentence imposed on October 21, 1994.

In his opening brief in this appeal, No. 24820, Eisermann states that "[t]he truth to this story is, that [Eisermann] had been asked by [the complaining witness] to have sex. She being 25 years back in 1991, and [Eisermann] twice her age, it seemed wonderful at the time to be asked by a younger woman."

In his May 2, 2000 HRPP Rule 40 Petition and his September 11, 2000 Addendum, Eisermann asserted grounds for relief in the following categories: (a) Judge Gail Nakatani erred in not replacing trial counsel; (b) multiple instances of the ineffective assistance of trial counsel; (c) against his will, he was placed on the stand and testified; (d) at trial, Judge Norman Lewis failed to notice "the lies being told by the accusing witness"; (e) multiple instances of the ineffective assistance of appellate counsel; and (f) the prosecutor failed "to protect the innocent from wrongful prosecution" and "[b]eing a highly trained professional in the area of prosecuting the guilty, he should be able to see when a person is not guilty of the crimes being accused of by carefully studying the evidence presented him."

On October 3, 2001, without a hearing, Judge Virginia Lea Crandall entered the "Findings of Fact, Conclusions of Law and Order" (1) generally deciding that "the claims are without merit and are either a matter of litigation strategy and tactics or not supported by the record"; "[Eisermann] has failed to support any of his claims and an examination of the record shows that [Eisermann's] allegations, if taken as true, would not change the verdict and/or outcome on appeal, and therefore, [Eisermann] has not presented a colorable claim"; and "[Eisermann's] claims are patently frivolous and without a trace

of support in the record" and (2) specifically discussing and denying each of Eisermann's alleged grounds for relief.

Eisermann filed his notice of appeal on October 16, 2001.

In his opening brief, Eisermann asserts the following grounds for relief:

1.

Judge Gail Nakatani "erred by refusing to replace trial counsel James Miura after Petitioner requested the same, and Mr. Miura stated that he was not prepared and showed no interest in the case. Instead, Judge Nakatani instructed Mr. Miura to prepare for trial and refused to have him replaced."

2.

Eisermann's trial counsel (a) failed to prepare for trial, (b) failed to re-cross a witness to establish that the witness had committed perjury, (c) failed to depose a witness prior to trial, (d) failed to request that the jury be instructed on a potentially meritorious defense, (e) failed to withdraw from the case upon a timely request by Eisermann,[1] (f) placed

[1] In his September 11, 2000 "Addendum to Petition for Rule 40 Post-Conviction Relief," Petitioner-Appellant Wolfgang Eisermann (Eisermann)'s allegation in this regard was that trial counsel "did not request in a timely manner to be repl[a]ced in the representation of [Eisermann] even when directed to do so by Mr. Scott O'Neil and Charlene Norris, of the Office of Disciplinary Counsel."

Eisermann on the witness stand against Eisermann's consent,[2] (g) allowed "the prosecuting attorney to twist the testimony given by [Eisermann] to convict him," and (h) "prejudiced [Eisermann] to have him convicted.

3.

The prosecutor (a) "failed to disclose perjury committed by the accuser"; (b) failed to follow the professional guidelines of the American Bar Association, the Hawaii Bar, and the Rules of Professional Conduct; (c) failed to recognize the statements given by the complaining witness as false accusations and lies; (d) failed to bring to the attention of the court and the defense the contradictory statements by the accuser;

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[2] In his opening brief, Eisermann states, in relevant part, as follows:

> [Eisermann] . . . contents [sic] that he never waived his rights not to testify and that his own attorney violated his right to protect him from self-incrimination, by placing him unto the stand. The decision to testify is ultimately committed to a defendant's own discretion.
>
> . . . .
>
> . . . Counsel took the extraordinary step of placing his client on the stand without any witness preparation, without a trial strategy, without a discernible purpose, without any certainty as to what [Eisermann] would say, and with some concern that [Eisermann] would incriminate himself. Counsel, on direct examination by prosecutor, did not interject [sic] to any question ask[ed], nor did counsel ask to have some of the damaging answers and or questions stricken from the record. In either event, [Eisermann] was deprived of the protection of the Fifth Amendment. It is obvious that [Eisermann's] ill-advised testimony was prejudicial to the outcome of the trial. Counsel's failure to adequately protect [Eisermann's] rights pertaining to making statements on the witness stand, fell below the objective standard or reasonableness and amounted to a deficient performance. There is a reasonable probability that, but for this deficiency, that is, the deficiency undermined confidence in the outcome.

(e) "failed to take into consideration Petitioner's explanation of why he could not have committed these crimes"; and (f) "failed to impeach his witness ([complaining witness]) pursuant to Hawaii Rules of Evidence Rule 607."

4.

Trial Judge I. Norman Lewis[3] "erred by not noticing the lies told by the complaining witness[.]"

5.

Eisermann's appellate counsel, Reinhard Mohr, (a) "did not address all the issues" and wrote the appeal "in an ineffective manner," "failed to raise the ineffectiveness of trial counsel, prosecuting attorney and judge," "[f]urthermore, Reinhard Mohr has since been disbarred for the use of narcotics, which he had been abusing during the time of the formulation of this appeal," and "[Eisermann] is under the impression, that Reinhard Mohr was under the influence of drugs during the time of the preparation of the appellate brief"; (b) "by failing to

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[3] Eisermann further argued that Judge I. Norman Lewis

> is a District Court Judge, and not a Circuit Court Judge in order to be on the bench when conducting a criminal case. According to the rules set forth by the court, the jurisdiction of a District Court judge ends when he has to sentence a person to more than one year to prison. The rules furthermore require a former Circuit Court judge be placed onto the bench temporarily for the duration of the trial. Even if this former judge is now in privat[e] practice. This was not done in the case at bar, and [Eisermann] was convicted of a crime that he did not committed. [sic] . . .

It appears that Eisermann is unfamiliar with the provision in Article VI, Section 2, of the Hawai'i State Constitution stating that "[t]he chief justice may assign . . . a judge of the district court to serve temporarily on the circuit court."

present [Eisermann] with a copy of the complete opening brief . . . [Eisermann] could not correct the omissions therein"; and (c) refused "to accept a certified letter from [Eisermann]. As a result[,] Donald Wilkerson was appointed as new appellate counsel."

6.

His appellate counsel, Donald L. Wilkerson, (a) "by not notifying [Eisermann] of the denial of [Eisermann's] direct appeal by the Intermediate Court of Appeals[,] . . . caused procedural defaults or 'time bars' in both state and federal court. Donald Wilkerson failed to file Notice of Certiorari or direct appeal to the Supreme Court. Subsequently, by not being made aware of said denial, [Eisermann] could not file a timely Notice of Appeal on his own behalf"; (b) "[b]y failing to exhaust state remedies, [Eisermann] was barred from bringing his case before the United States Appellate Court";[4] (c) "by not releasing [Eisermann's] files and transcripts, as well as other documents. . . , [Eisermann] was not able to fight for his freedom until said files had been ordered by the Honorable Paula Nakayama, with the assistance of appointed stand-by counsel"; and (d) "[Eisermann's] appellate counsel Donald Wilkerson is presently being suit [sic] in civil action, and a complaint against him is now pending before the Disciplinary Counsel."

[4] See Eisermann v. Penarosa, 33 F. Supp. 2d 1269 (D. Hawaii 1999).

7.

The courts did not allow Eisermann an evidentiary hearing on any of his petitions.

PRECEDENT

A.

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).

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).

C.

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.

DECISION

Eisermann having waived all issues that could have been raised in appeal No. 18566, the sole issue is whether Eisermann has presented a colorable claim that Eisermann's appellate counsel in appeal No. 18566 provided Eisermann with the ineffective assistance of appellate counsel. Upon a review of the record, we agree with Judge Crandall's reasons for denying, without a hearing, Eisermann's May 2, 2000 HRPP Rule 40 Petition and the September 11, 2000 Addendum. Eisermann has not satisfied his two-part burden stated in Barnett quoted above.

CONCLUSION

In accordance with Hawai‘i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the "Findings of Fact, Conclusions of Law and Order" from which the appeal is taken, filed on October 3, 2001, is affirmed.

DATED: Honolulu, Hawai‘i, April 22, 2003.

On the briefs:

Wolfgang Eisermann,
Petitioner-Appellant, *pro se*. Chief Judge

Mangmang Qiu Brown,
Deputy Prosecuting Attorney, Associate Judge
City and County of Honolulu,
for Respondent-Appellee.

Associate Judge