NO. 25983

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

RICHARD K. DAVIS, Petitioner-Appellant, v.
STATE OF HAWAIʻI, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP NO. 02-1-0026)
(CR. NO. 97-1028)

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

Richard K. Davis (Petitioner) appeals, *in propria persona*, the findings of fact, conclusions of law and order entered on June 20, 2003 in the circuit court of the first circuit in SPP No. 02–1-0026.[1] The court's order dismissed, without a hearing, Petitioner's April 10, 2002 Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 (2002)[2] petition for post-conviction relief, which he also brought *pro se*. We affirm.

I. Background.

In his Rule 40 petition, Petitioner attacked the October 1, 1998 judgment in Cr. No. 97-1028[3] that convicted him

[1] The Honorable Reynaldo D. Graulty, judge presiding.

[2] "[Hawaiʻi Rules of Penal Procedure (HRPP)] Rule 40 has since been amended. However, because [Petitioner's] petition . . . was filed prior to [July 1, 2003], the effective date of the amendments, we will apply the [2002] version[] of HRPP Rule 40 to the present analysis." Stanley v. State, 76 Hawaiʻi 446, 447 n.1, 879 P.2d 551, 552 n.1 (1994).

[3] The Honorable Herbert K. Shimabukuro, judge presiding.

of robbery in the first degree[4] (Counts I and II), possession of a firearm by a person convicted of certain crimes[5] (Count III) and place to keep pistol or revolver[6] (Count V); and sentenced him, as a repeat offender, to mandatory minimum terms of imprisonment on each of the foregoing counts. The charges arose out of the stickup of the Wasabi Bistro restaurant. Petitioner was represented by counsel in the jury trial in Cr. No. 97-1028. There, Petitioner stipulated that on April 20, 1997, the date of the offenses, he "was a person who had previously been convicted in the State of Hawaii or elsewhere of having committed a felony offense." In the stipulation, Petitioner also acknowledged

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[4] Hawaii Revised Statutes (HRS) § 708-840(1)(b)(ii) (1993 & Supp. 2003) provides that, "A person commits the offense of robbery in the first degree if, in the course of committing theft: The person is armed with a dangerous instrument and: The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property." (Enumeration omitted; format modified.) HRS § 708-840(2) (1993) provides, in pertinent part, that "'dangerous instrument' means any firearm, whether loaded or not, and whether operable or not[.]"

[5] HRS § 134-7(b) (Supp. 1997) provides that, "No person who . . . has been convicted in this State or elsewhere of having committed a felony, . . . shall own, possess, or control any firearm or ammunition therefor."

[6] HRS § 134-6(c) (Supp. 1997) provides:

> Except as provided in sections 134-5 and 134-9, all firearms and ammunition shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms or ammunition or both in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following: a place of repair; a target range; a licensed dealer's place of business; an organized, scheduled firearms show or exhibit; a place of formal hunter or firearm use training or instruction; or a police station. "Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

having "knowingly, intelligently, and voluntarily" waived attendant constitutional rights. The predicate felonies relied upon by the State in its July 10, 1998 motion for sentencing of repeat offender were two robbery in the first degree convictions, judgments entered on January 26, 1981 in CR 54746 and CR 54786, respectively.

In his Rule 40 petition, Petitioner noted that he had been granted a Certificate of Final Discharge (the CFD) by the Hawaii Paroling Authority on November 26, 1996, with respect to the two predicate felonies and two other previous felony convictions (three convictions on November 10, 1980 and one conviction on November 14, 1991, in various criminal numbers). The CFD stated:

> The Hawaii Paroling Authority of the State of Hawaii, acting in accordance with the power in it vested by law, being first fully satisfied that in its opinion the above named paroled prisoner, whose record appears on the reverse hereof, has given reliable and trustworthy evidence that he will remain at liberty without violating the law and the final release is not incompatible with the welfare and safety of society, does hereby grant unto said paroled prisoner a
>
> FINAL DISCHARGE
>
> from further liability under his sentence.
>
> In accordance with Act 250, Session Laws of Hawaii, 1969[7]

[7] 1969 Haw. Sess. L. Act 250 has been codified in HRS ch. 831 (1993 & Supp. 2003), as amended. HRS § 831-5(a) (1993) provides:

> If the sentence was in this State, the order, certificate, or other instrument of discharge, given to a person sentenced for a felony upon the person's discharge after completion of service of the person's sentence or after service under probation or parole, shall state that the defendant's rights to vote and to hold any future public office, of which the defendant was deprived by this chapter, are thereby restored and that the defendant

(continued...)

> his right to vote and to hold any public office has been restored to him.

(Footnote supplied.) Thereupon, Petitioner contended with a myriad of arguments and purported authorities that he had been wrongfully convicted and sentenced in Cr. No. 97-1028, because the CFD "had absolved him from any and all further liability and disabilities from Petitioner's past felony convictions and sentence"; and "in essence had rendered past felony convictions invalid and unconstitutional for use against Petitioner." Petitioner also argued that the

> CFD did not expressly provide that Petitioner may not possess firearms and/or ammunitions [sic]. Nor did the Hawai‘i paroling authorities verbally inform or require that Petitioner sign a waiver as a condition of being discharged as his rights to due process and equal protection of the laws would have afforded him. Petitioner further argues that the state's ban on "firearms possession" by previously convicted felons is vague and ambiguous, leaving room for exceptions to the ban because state statute does not specifically identify weapon that Petitioner is charged with and that the state's ban on firearm possession by formerly convicted felons is not absolute.

Petitioner requested, therefore, "that his robbery and firearms convictions be vacated and dismissed, or that these convictions be vacated and the matter be remanded for a new trial."

In its answer to the Rule 40 petition, the State noted that Petitioner had appealed, with counsel in S.C. No. 22021, his convictions and sentences in Cr. No. 97-1028, without raising the issues he raised in the Rule 40 petition; that this court had

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[7](...continued)

> suffers no other disability by virtue of the defendant's conviction and sentence except as otherwise provided by this chapter. A copy of the order or other instrument of discharge shall be filed with the clerk of the court of conviction.

affirmed the relevant convictions and sentences via summary disposition order filed on February 22, 2001; and that on July 3, 2001, the supreme court had dismissed Petitioner's writ of certiorari as improvidently granted. The State also opposed the Rule 40 petition on the merits.

In dismissing the Rule 40 petition without a hearing, the court cited, *inter alia*, HRPP Rules 40(a)(3), 40(f) and 40(g)(2).[8]

II. Discussion.

On appeal, Petitioner requests "that his Robbery and Firearm convictions be vacate [sic] and dismissed, or that these convictions be vacated and the matter remanded for a new trial,

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[8] HRPP Rule 40(a)(3) (2002) provided:

> 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.

HRPP Rule 40(f) (2002) provides, in pertinent part, that

> 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.

HRPP Rule 40(g)(2) (2002) provides:

> The court may dismiss a petition at any time upon finding the petition is patently frivolous, the issues have been previously raised and ruled upon, or the issues were waived. The court may deny a petition upon determining the allegations and arguments have no merit.

or resentencing." Opening Brief at 8. From what we can discern from the briefs submitted on appeal, Petitioner presents three points of error on appeal.

First, Petitioner notes that the court considered Hawaii Revised Statutes (HRS) § 831-5(a) (1993)[9] and HRS § 353-70 (1993)[10] in deciding the Rule 40 petition. Petitioner avers, however, that the court erred because the judge "failed to take into consideration [HRS] § 760-670(a) in rendering his decision." Opening Brief at 3. Try as we might, we have not been able to locate HRS § 760-670(a). Hence, we must assume that Petitioner is referring to HRS § 706-670 (1993 & Supp. 2003) –- in particular, the only colorably pertinent subsection, HRS § 706-670(9) (1993).[11] Even if Petitioner is correct that the court did not consider HRS § 706-670(9) in fashioning its decision, his averment of error is still unavailing, for HRS § 706-670(9) does not support the propositions Petitioner urged in his Rule 40

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[9] See supra, note 7.

[10] HRS § 353-70 (1993) provides, in pertinent part:

> Whenever, in its opinion, any paroled prisoner has given such evidence as is deemed reliable and trustworthy that the paroled prisoner will remain at liberty without violating the law and that the paroled prisoner's final release is not incompatible with the welfare of society, the Hawaii paroling authority may grant the prisoner a written discharge from further liability under the prisoner's sentence.

[11] HRS § 706-670(9) (1993) provides:

> When the prisoner's maximum parole term has expired or the prisoner has been sooner discharged from parole, a prisoner shall be deemed to have served the prisoner's sentence and shall be released unconditionally.

petition. Nor does HRS § 831-5(a), or HRS § 353-70, either singly or in combination with the others. Nor do the many and multifarious arguments and authorities advanced by Petitioner, both on appeal and below. Indeed, we have been unable on our own to locate any apposite authority for Petitioner's fundamental propositions. Simply put, Petitioner's basic propositions are wholly untenable, and present no colorable claim. Accordingly, the court did not err in dismissing the Rule 40 petition, any purported lacuna in the materials under its consideration notwithstanding. HRPP Rule 40(g)(2).

By the same token, Petitioner's second point of error on appeal -- that the court erred in dismissing the Rule 40 petition without a hearing -- is without merit. HRPP Rule 40(f); Stanley v. State, 76 Hawai‘i 446, 449, 879 P.2d 551, 554 (1994) (where the Rule 40 petitioner's allegations "show no colorable claim, it is not error to deny the petition without a hearing" (citations and block quote format omitted)).

By the same token again, Petitioner's final point of error on appeal -- that his trial and appellate counsel rendered ineffective assistance of counsel by failing to advance the CFD in Petitioner's defense -- must fail. Id. at 450, 879 P.2d at 555 (there is no colorable Rule 40 ineffective assistance of counsel claim in the absence of "facts showing that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense" (citations and

internal quotation marks omitted)).

Finally, if in this opinion we have neglected to consider any issue or point of error Petitioner intended to raise on appeal, it is only because the issue or point of error was either incomprehensible, or unaccompanied by discernible argument, Hawai‘i Rules of Appellate Procedure Rule 28(b)(7) (2004) ("Points not argued may be deemed waived."); Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 158, 434 P.2d 516, 518 (1967), or both.

III. Conclusion.

Accordingly, the findings of fact, conclusions of law and order, entered on June 20, 2003 in the circuit court of the first circuit in SPP No. 02-1-0026, are affirmed.

DATED: Honolulu, Hawai‘i, January 21, 2005.

On the briefs:

Richard K. Davis,
petitioner-appellant,
pro se.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for respondent-appellee.

Chief Judge

Associate Judge

Associate Judge