

NO. 25461

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

EUGENE JAMES HUTCH, Petitioner-Appellant, v
STATE OF HAWAI'I, Respondent-Appellee

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 02-1-0025)

MEMORANDUM OPINION

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

Petitioner-Appellant Eugene James Hutch (Hutch) appeals from the October 18, 2002 First Circuit Court judgment denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief.¹ We affirm.

BACKGROUND

On April 10, 2002, Hutch filed a "Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" (April 10, 2002 Rule 40 Petition) regarding the Judgment entered on November 29, 1985 in First Circuit Court, Cr. No. 60333, convicting him of Terroristic Threatening in the First Degree. In response to the question in the petition, "State concisely every ground on which you claim that you are being held unlawfully[,]" Hutch stated, in relevant part, as follows:

- A. Ground one: Petitioner is being punished for helping inmates
-

¹ The Honorable Victoria S. Marks presided.

B. Ground two: Petitioner has been denied proper medical care for filing lawsuits.

.....

C. Ground three: Petitioner has had his and other prisoners [sic] legal documents taken.

.....

D. Ground four: The prison staff are allowed to enforce rules repealed already

.....

[E.] Ground Five: Petitioner has been punished and continues to get punished for helping fellow prisoners try and gain adequate effective and meaningful access to the various courts.

Supporting Facts: Petitioner is one of the State of Hawaii's jailhouse lawyers and the Prison staff continues to punish the Petitioner for that pursuant to a Prison Rule HAR [Hawaii Administrative Rules] § 17-202-1(b) that has been repealed since April 15, 2000

.....

[F.] Ground Six: The State of Hawaii Prison Staff and court system has failed to following [sic] the authority set out in Gluth v. Kangas, 951 F.2d 1504, at 1508 [] (9th cir. 1991), and has hindered all prisoners adequate, effective, and meaningful access to all the courts.

.....

[G.] Ground Seven: Petitioner's Parole has been denied through retaliation of Petitioner filing petitions, civil matters, for other inmates.

On October 18, 2002, the circuit court filed its "Findings of Fact, Conclusions of Law and Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody," stating, in relevant part:

FINDINGS OF FACT

.....

Procedural Background

.....

3. On May 10, 1984, the Complaint in State v. Hutch was filed charging [Hutch] with Terroristic Threatening in the First Degree.

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4. [Hutch] was convicted as charged by a Jury.
5. [Hutch] was represented by counsel before and during the trial.
6. On November 29, 1984 [Hutch] was sentenced to an open FIVE (5) year term. . . .
7. On January 30, 1985 [Hutch] filed a Notice of Appeal.
8. On April 5, 1988 [Hutch's] conviction was affirmed via Memorandum Opinion filed under Supreme Court No. 10459. . . .
9. On April 20, 1989 [Hutch], having served the maximum sentence, was discharged. . . .

Defendant/Petitioner's other Criminal Matters and other Post-Conviction Proceedings

10. [Hutch] has a total of seven (7) criminal cases:

Cr. No. 60333	Terroristic Threatening 1
Cr. No. 89-0395	Terroristic Threatening 2; Assault 3
Cr. No. 90-0277	Theft 2
Cr. No. 90-1711	Theft 2
Cr. No. 94-2819	Promoting Dangerous Drug 3; Unlawful Use of Drug Paraphernalia
Cr. No. 94-1076	Promoting Dangerous Drug 3; Unlawful Use of Drug Paraphernalia
Cr. No. 96-2224	Robbery 2
11. [Hutch] has filed a total of twenty-five (25) Post Conviction (Rule 40) Petitions. . . .

CONCLUSIONS OF LAW

The Defendant/Petitioner's Judgment has been satisfied

1. Hawaii Rules of Penal Procedure, Rule 40(a)(2) states that:

From Custody. Any person may seek relief under the procedure set forth in this rule from custody based upon a judgment of conviction, on the following grounds:

- (i) that the sentence was fully served;
- (ii) that parole or probation was unlawfully revoked; or
- (iii) any other ground making the custody, though not the judgment, illegal. . . .

2. [Hutch] has been discharged from custody for the conviction in Cr. No. 60333. Consequently, he is not seeking relief "from custody based upon a judgment of conviction."

Issues Previously Ruled Upon or Waived

3. Hawaii Rules of Penal Procedure, Rule 40(a)(3) states that:

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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. . . .

Hawaii Rules of Penal Procedure, Rule 40(g)(2) states that:

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.

4. [Hutch] now raises issues which have been previously raised and ruled upon or the issues were waived. Therefore, relief under this Rule 40 petition is inappropriate.

5. For example, [Hutch] has appealed his conviction in Cr. No. 60333. In addition, [Hutch] has now filed a total of **four** (4) Rule 40 Petitions which involved Cr. No. 60333. See, SPP 86-0022, SPP 93-0055, SPP 01-1-0029 and this Petition.

6. . . . [T]he issues raised by [Hutch] are patently frivolous and lack merit. [Hutch's] claims can be summarized as complaints about the way he is treated while incarcerated. His allegations regarding assisting other inmates can be summarized as [Hutch] complaining that he is being asked to stop violating the law. See, HRS [Hawaii Revised Statutes] §§605-14, 605-15.2 and 605-17.² [Hutch's] allegations about denial of medical care are

² Hawaii Revised Statutes (HRS) § 605-14 (2001) states, in relevant part:

Unauthorized practice of law prohibited. It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States. Nothing in sections 605-14 to 605-17 contained shall be construed to prohibit the preparation or use by any party to a

also without merit. [Hutch's] own exhibits to the Petition demonstrate that his medical needs are being addressed. Furthermore, nothing in his Petition demonstrates that he has been denied access to the courts. In fact, his many court filings indicate the contrary. Also, nothing in his Petition demonstrates that his parole (though based on another conviction) was unlawfully denied. Similarly, nothing in his Petition demonstrates that his custody is illegal.

Based upon all the above, the Petition to Vacate, Set Aside, or correct Judgment or to release Petitioner From Custody is hereby DENIED without a hearing.

(Footnote added; footnote omitted; emphasis in original.)

On November 7, 2002, Hutch filed a notice of appeal. The appeal was assigned to this court on April 30, 2004.

POINT ON APPEAL

Upon review of Hutch's opening brief, we construe his sole point on appeal to be that the circuit court erred by denying his April 10, 2002 Rule 40 Petition without an evidentiary hearing.

STANDARD OF REVIEW

Regarding the denial of a HRPP Rule 40 petition without an evidentiary hearing, HRPP Rule 40(f) (2002) provides in relevant part:

transaction of any legal or business form or document used in the transaction.

HRS § 605-15.2 (1993) states, in relevant part:

Remedies. Remedies for the violation of section 605-14 shall include injunctive and declaratory relief; and other existing remedies. In addition, the attorney general may maintain a criminal action against any person who violates section 605-14, the penalties for which are set forth in section 605-17.

HRS § 605-17 (2001) states, in relevant part:

Penalties. Any person violating sections 605-14 to 605-16 shall be guilty of a misdemeanor.

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Hearings. 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.

In Barnett v. State, 91 Hawai'i 20, 979 P.2d 1046

(1999), the Hawai'i Supreme Court stated:

As 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.*

State v. Allen, 7 Haw. App. 89, 92-93, 744 P.2d 789, 792-93 (1987) (emphasis added).

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*. See United States v. Burrows, 872 F.2d 915 (9th Cir. 1989) (denial of a post-conviction motion based on ineffective assistance of counsel without conducting an evidentiary hearing is reviewed *de novo* for a determination of whether the files and records of the case conclusively show that petitioner is entitled to no relief). 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.

Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

Barnett, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999) (brackets and ellipsis omitted; emphasis in original).

DISCUSSION

The circuit court based its denial of the April 10, 2002 Rule 40 Petition on three grounds: (1) in the relevant criminal case, First Circuit Court Cr. No. 60333, Hutch had already been discharged from custody, (2) the April 10, 2002 Rule 40 Petition raised issues that had already been ruled upon or waived, and (3) Hutch's claims were patently frivolous.

1. Hutch has already been discharged from custody.

After Hutch served the maximum sentence for his conviction in Cr. No. 60333, the Hawaii Paroling Authority discharged Hutch from custody on April 20, 1989. In Cr. No. 60333, Hutch had no basis for seeking relief from custody under HRPP Rule 40(a)(2).³ Thus, Hutch's Ground Seven is without merit.

Hawai'i Rules of Penal Procedure Rule 40(a)(1) (2002) states, in relevant part:

³ Hawai'i Rules of Penal Procedure (HRPP) Rule 40(a)(2) (2002) states as follows:

FROM CUSTODY. Any person may seek relief under the procedure set forth in this rule from custody based upon a judgment of conviction, on the following grounds:

- (i) that sentence was fully served;
- (ii) that parole or probation was unlawfully revoked; or
- (iii) any other ground making the custody, though not the judgment, illegal.

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FROM JUDGMENT. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawaii;

(ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter;

(iii) that the sentence is illegal;

(iv) that there is newly discovered evidence; or

(v) any ground which is a basis for collateral attack on the judgment.

However, six of the seven grounds stated in the April 10, 2002 Rule 40 Petition pertain to how he is being treated while in prison. Hutch has failed to demonstrate, and we are unable to discern, how any of his cited grounds fall into any of the categories specified in HRPP Rule 40(a)(1).

2. Hutch raises issues that have
already been ruled upon or waived.

Hawai'i Rules of Penal Procedure Rule 40(a)(3) (2002)

states, in relevant part:

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.

As noted by the circuit court in its October 18, 2002 findings, Hutch directly appealed his conviction in Cr. No. 60333. Further, he previously filed four HRPP Rule 40 petitions

involving Cr. No. 60333. In these prior petitions, Hutch challenged his conviction by raising issues similar to the ones he raises in the instant petition (e.g., enforcement of repealed administrative rules and hindrance of his activities as a jail-house lawyer). In appeal no. 24965 (SPP No. 01-1-0029), Hutch alleged that "(1) Hawai'i Administrative Rules (HAR) § 17-202-1(b) denies him adequate legal assistance; (2) stand-by counsel denied him adequate access to his preliminary hearing transcripts (PHTs) during the pre-trial phase; and (3) prison staff continue to deny him legal and other services needed to challenge his case." The supreme court held that Hutch's claims were without merit. Therefore, even if the claims asserted by Hutch in the instant petition were colorable, HRPP Rule 40(a)(3) would preclude relief.

3. Hutch's claims are patently frivolous.

Hawai'i Rules of Penal Procedure Rule 40(g) (2002) states, in relevant part:

(2) AGAINST THE PETITIONER. 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.

The record on appeal is filled with a multitude of exhibits submitted by Hutch, ostensibly to provide support for the allegations asserted in his April 10, 2002 Rule 40 Petition. However, none of these exhibits provide any support for Hutch's allegations that he is being punished for his actions, that he is

being denied proper medical care, that he is improperly being denied a parole hearing, that he is the subject of an illegal conviction and custody, and that he has been denied access to the courts.

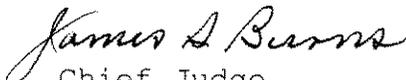
CONCLUSION

Accordingly, the judgment filed in the Circuit Court of the First Circuit on October 18, 2002 is affirmed.

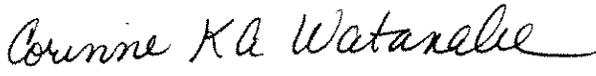
DATED: Honolulu, Hawai'i, March 18, 2005.

On the briefs:

Eugene James Hutch
Pro Se Petitioner-Appellant.


Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent-Appellee.


Associate Judge


Associate Judge