

NOT FOR PUBLICATION

NO. 25982

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
KEITH ASUNCION, Defendant-Appellant,  
and  
MOANA ASUNCION, Defendant

APPEAL FROM THE FIFTH CIRCUIT COURT  
(CR. NO. 02-1-0124)

HONORABLE T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

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FILED

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Keith Asuncion (Asuncion) appeals from the "Order Denying Defendant's [sic] Keith Asuncion's Motion to Correct Sentence" (Order) filed June 24, 2003 in the Circuit Court of the Fifth Circuit (circuit court).<sup>1/</sup> Asuncion pled guilty to Promoting a Dangerous Drug in the Second Degree in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(a) (Supp. 2004).<sup>2/</sup> The circuit court sentenced Asuncion to ten

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<sup>1/</sup> The Honorable Clifford L. Nakea presided.

<sup>2/</sup> Hawaii Revised Statutes (HRS) § 712-1242 (Supp. 2004) provides in relevant part:

**§ 712-1242 Promoting a dangerous drug in the second degree.**

(1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:

- (a) Possesses twenty-five or more capsules, tablets, ampules, dosage units, or syrettes, containing one or more dangerous drugs[.]

. . . .

(continued...)

years of imprisonment, with a mandatory minimum term of three years and four months pursuant to HRS § 706-606.5(1)(a)(iii) (Supp. 2004). On May 9, 2003, Asuncion filed a motion pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35 (Rule 35 motion), contending that the search warrant was defective and therefore his arrest, conviction, and sentence were illegal and must be corrected. The circuit court denied the Rule 35 motion, ruling that Asuncion waived his right to contest the search warrant when he pled guilty and that Asuncion's "assertion that the search warrant was defective [was] without merit."

On appeal,<sup>2/</sup> Asuncion contends the circuit court erred in denying his Rule 35 motion because (1) Asuncion did not waive his right to contest the search warrant and right to trial by jury, (2) Asuncion had ineffective assistance of counsel and (3) "the court should have afforded [Asuncion] an opportunity to withdraw his plea and challenge the warrant."

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<sup>2/</sup>(...continued)

(2) Promoting a dangerous drug in the second degree is a class B felony.

<sup>3/</sup> The opening brief of Defendant-Appellant Keith Asuncion (Asuncion) fails to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) in failing to include in each of the concise statements of the points of error "(ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court[.]" Asuncion's counsel was previously warned on March 31, 2003 concerning his failure to follow HRAP Rule 28. Counsel is hereby warned that future non-compliance with HRAP 28(b)(4) will result in sanctions against him.

Upon careful review of the record and the briefs submitted by the parties, we hold:

(1) Asuncion failed to meet his "burden of demonstrating by a preponderance of the evidence that his/her waiver was involuntary." State v. Friedman, 93 Hawai'i 63, 69, 996 P.2d 268, 274 (2000).

(2) Asuncion's trial counsel's failure to make a motion to withdraw guilty plea did not rise to an "error that resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Brantley, 84 Hawai'i 112, 122, 929 P.2d 1362, 1372 (App. 1996). Asuncion fails to show any "specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence" or that "such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Wakisaka, 102 Hawai'i 504, 514, 78 P.3d 317, 327 (2003) (internal quotation marks and citation omitted).

(3) Asuncion did not file an HRPP Rule 32(d) motion to withdraw his guilty plea in the circuit court.

Therefore,

IT IS HEREBY ORDERED that the "Order Denying Defendant's [sic] Keith Asuncion's Motion to Correct Sentence"

filed June 24, 2003 in the Circuit Court of the Fifth Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 31, 2005.

On the briefs:

Daniel G. Hempey  
for defendant-appellant.

Tracy Murakami,  
Deputy Prosecuting Attorney,  
County of Kaua'i,  
for plaintiff-appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge