

NOT FOR PUBLICATION

NOS. 26007 & 26077
IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

NO. 26007
(CR. NO. 92-3018)
STATE OF HAWAI'I, Plaintiff-Appellee, v.
JAMES TRUEMAN, Defendant-Appellant

NO. 26077
(S.P.P. NO. 02-1-0082)
JAMES TRUEMAN, Petitioner-Appellant v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT

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

2005 JUN 20 AM 9:11

FILED

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

In this consolidated appeal, Petitioner-Appellant James Trueman (Trueman) appeals from the Decision and Order Denying Petition for Post-Conviction Relief Without a Hearing filed on July 10, 2003 in the Circuit Court of the First Circuit (circuit court).^{1/}

On March 30, 1993, a jury found Trueman guilty of one count of Attempted Promoting a Dangerous Drug in First Degree and two counts of Promoting a Dangerous Drug in the Second Degree. The circuit court sentenced Trueman on May 11, 1993 to an indeterminate open prison term of twenty years for Attempted Promoting a Dangerous Drug in First Degree and indeterminate open

^{1/} The Honorable Richard K. Perkins presided.

terms of ten years for each of the two counts of Promoting a Dangerous Drug in the Second Degree. The Judgment was filed on May 11, 1993. Trueman did not appeal from the Judgment.

On May 5, 1995, Trueman filed a Petition for Post-Conviction Relief in S.P.P. 95-0009 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (First Petition). Trueman alleged that he had been (1) denied effective assistance of counsel because his counsel failed to properly cross-examine a State's witness to show that the witness committed perjury; (2) denied the right to appeal because his "Attorney failed to file an appeal per [his] instructions"; and (3) convicted illegally by the perjury of the State's witness. On August 28, 1995, the circuit court denied the First Petition without a hearing pursuant to HRPP Rule 40(f), finding that the three claims advanced by Trueman were "patently frivolous and without a trace of support in the record or from other evidence submitted by the petitioner." Trueman did not appeal the denial of the First Petition.

On November 15, 2002, Trueman filed a second Petition for Post-Conviction Relief in S.P.P. No. 02-1-0082 (Second Petition). Trueman alleged that if any of his grounds for relief had not been previously presented it was because "I was not aware of my constitutional right until I came back to prison." Trueman alleged the following grounds for relief: (1) denial of

effective assistance of counsel ("At our first meeting I had ask my lawyer to take pictures of the area of the bar and he never."); (2) denial of effective assistance of counsel ("At trial I had told my lawyer that the prosecutor witness was perjury on the stand under oath."); (3) denial of effective assistance of counsel, illegal judgment and conviction ("Lack of proper evidence and foundation, making judgment and conviction illegal, constitute an illegal custody and for restrain."); and (4) denial of right of appeal ("When the trial was over, I had ask my lawyer to put in an appeal and he never.").

On July 10, 2003, the circuit court filed its Decision and Order Denying Petition for Post-Conviction Relief Without a Hearing. The circuit court concluded:

2. As to the instant petition, because each of the three grounds for relief alleged therein was raised by Petitioner and determined by the court on August 28, 1995 in SPP No. 95-0009, "Rule 40 proceedings [are] not available and relief thereunder shall not be granted."

3. Even assuming arguendo that one or more of the issues raised in the instant petition were not previously raised and ruled upon in SPP No. 95-0009, relief would still be unavailable because the instant petition fails to allege facts sufficient either to rebut the presumption that the failure to raise the issue in the prior proceeding was knowing and understanding or to establish extraordinary circumstances justifying that failure.

Trueman filed two notices of appeal from the order denying his Second Petition: (1) in Cr. No. 92-3018 on August 4, 2003 (No. 26007), and (2) in S.P.P. No. 02-1-0082 on September 8, 2003 (No. 26077). The two appeals were consolidated on November 5, 2003.

On appeal, Trueman argues that (1) he received ineffective assistance of counsel because his trial counsel failed to investigate his case and failed to present photographs and/or floor plans of the site of the alleged offenses; (2) he received ineffective assistance of counsel because his counsel threatened to withdraw as his attorney if Trueman testified at sentencing; (3) the evidence was insufficient to support his conviction because his intent to sell was not proven beyond a reasonable doubt; (4) the circuit court gave incomplete and erroneous jury instructions because Trueman did not sell drugs to the undercover officer; and (5) Trueman was denied his right of appeal because his counsel failed to perfect an appeal of Trueman's convictions and sentences despite clear instructions from Trueman to do so.

When the circuit court denied the Second Petition, the court correctly applied HRPP Rule 40(a)(3) by finding that relief shall not be available under the rule where the issues asserted have been previously ruled upon or waived. Stanley v. State, 76 Hawai'i 446, 450, 879 P.2d 551, 555 (1994). Rule 40(a)(3) provides:

Rule 40. Post-conviction proceeding.

(a) *Proceedings and grounds.*

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(3) 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. Except for a claim of illegal

sentence, 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.

Since issue (1) could have been raised in an appeal from the Judgment or in the First Petition, it is therefore deemed waived. HRPP Rule 40(a)(3). Issues (2), (3), and (4) were not raised in the Second Petition and will not be considered by this court. Stanley, 76 Hawai'i at 451, 879 P.2d at 556. Even if issues (2), (3), and (4) had been raised, they were waived. HRPP Rule 40(a)(3). Issue (5) was previously raised in the First Petition and decided.

Therefore, the Decision and Order Denying Petition for Post-Conviction Relief Without a Hearing filed on July 10, 2003 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 20, 2005.

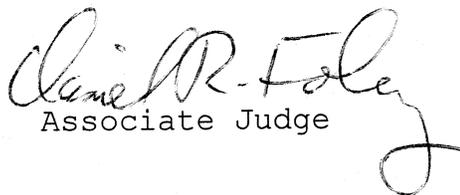
On the briefs:

James Trueman,
petitioner-appellant pro se.

Ryan Yeh,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for respondent-appellee.


Chief Judge


Associate Judge


Associate Judge