

NO. 26460

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
JAMES ZULUETA, Defendant-Appellant

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

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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,  
HONOLULU DIVISION  
(HPD CRIMINAL NO. SD0400835)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant James Zulueta (Zulueta) appeals the Judgment<sup>1/</sup> filed on March 16, 2004 in the District Court of the First Circuit, Honolulu Division (district court).<sup>2/</sup> The district court found Zulueta guilty of Assault in the Third Degree in violation of Hawaii Revised Statutes (HRS) § 707-712(1)(a) (1993) and sentenced him to 45 days of imprisonment and one year of probation.

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<sup>1/</sup> Defendant-Appellant James Zulueta (Zulueta) was charged with and found guilty of violating Hawaii Revised Statutes (HRS) § 707-712(1)(a) (1993). However, the March 16, 2004 Judgment fails to set forth the HRS subsection under which Zulueta was charged and convicted. The District Court of the First Circuit, Honolulu Division, is hereby ordered to file an Amended Judgment setting forth nunc pro tunc the particular HRS subsection under which Zulueta was convicted.

<sup>2/</sup> The Honorable Lono Lee presided.

On appeal, Zulueta claims he was denied his fundamental right to effective assistance of counsel because his attorney failed to (1) request a trial continuance to investigate, locate, and interview eyewitnesses and (2) move for judgment of acquittal.

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

(1) Zulueta has failed to show that his attorney's failure to request a trial continuance to investigate, locate, and interview an eyewitness resulted in ineffective assistance of counsel. State v. Okubo, 99 Hawai'i 219, 225, 53 P.3d 1204, 1210 (App. 2002); State v. Fukusaku, 85 Hawai'i 462, 480-81, 946 P.2d 32, 50-51 (1997); State v. Richie, 88 Hawaii 19, 39-40, 960 P.2d 1227, 1247-48 (1998). However, we deny this point without prejudice to Zulueta's filing a Hawai'i Rules of Penal Procedure Rule 40 petition on ineffective assistance of counsel as to this point.

(2) The failure of Zulueta's attorney to move for a judgment of acquittal did not result in ineffective assistance of counsel. The trial court was required to grant a judgment of acquittal if the State did not prove a *prima facie* case, regardless of whether the defendant moved for such acquittal. State v. Timoteo, 87 Hawai'i 108, 122-23, 952 P.2d 865, 880-81

(1997); State v. Kwak, 80 Hawai'i 297, 305, 909 P.2d 1112, 1120 (1995).

Therefore,

IT IS HEREBY ORDERED that the Judgment filed on March 16, 2004 in the District Court of the First Circuit, Honolulu Division, is affirmed.

DATED: Honolulu, Hawai'i, September 28, 2005.

On the briefs:

Chester M. Kanai  
for Defendant-Appellant.

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Plaintiff-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge