

NOT FOR PUBLICATION

NO. 26588

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

HERBERT H. B. YOUNG, Petitioner-Appellant v.
STATE OF HAWAI'I, Plaintiff-Appellee

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 TRAFFIC NOS. 01393086; 01393120; 01393143)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Herbert H. B. Young (Young) appeals from the "Order Summarily Denying Rule 40 Petition Without Hearing" (Order) filed on April 22, 2004 in the District Court of the First Circuit, Honolulu Division^{1/} (district court). The Order denied Young's Petition to Vacate, Set Aside or Correct Judgment (Petition) filed on June 6, 2003, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

On October 9, 2001, Young was arrested and charged with Driving Under the Influence of Intoxicating Liquor, Speeding, and Driving Left of Center. On November 9, 2001, Young was arraigned, pled not guilty, and stated that he wished to represent himself. The district court referred Young to the Office of the Public Defender as "back up" and/or advised Young to obtain his own counsel.

^{1/} The Honorable Fa'auuga To'oto'o presided.

Prior to his trial on December 28, 2001, Young informed the district court that he did not contact the Office of the Public Defender because he did not think he qualified. Young informed the district court that he had not hired a private attorney and that he had decided to represent himself. Before his trial began, Young pled guilty to the Speeding charge and not guilty to the Driving Under the Influence of Intoxicating Liquor and Driving Left of Center charges.

Prior to the start of Young's trial and again prior to his testifying, the district court advised Young of his right to testify or remain silent; Young elected to testify at his trial. The district court found Young guilty of all three counts, fined him \$456.00, and suspended his driver's license for ninety days. Young did not appeal his convictions.

On June 6, 2003, Young filed the Petition, seeking to set aside the judgments. Without holding a hearing on Young's Petition, the district court denied the Petition. In its April 22, 2004 Order, the district court made Findings of Fact and Conclusions of Law.

On appeal, Young contends (1) the district court erred in denying him an opportunity to be heard on his Petition on the ineffective assistance of counsel claim and (2) his constitutional right to due process was violated as a result of the district court's failure to provide him an opportunity to be

heard on his Petition on the ineffective assistance of counsel claim.

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

(1) Young waived his right to counsel both at arraignment and at trial. Finding of Fact No. 4 and Conclusion of Law No. 1 clearly reflect Young's waiver of counsel.^{2/}

"[W]here it appears from the record that a defendant has waived a constitutional right, the defendant carries the burden of proof to show otherwise by a preponderance of the evidence." State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993). Young has failed to carry his burden.

(2) "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." Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (quoting State v. Allen, 7 Haw. App. 89, 92, 744 P.2d 789, 792 (1987)). Young showed no colorable claim.

^{2/} Finding of Fact No. 4 reads as follows:

4. The Court also finds that Petitioner decided not to hire a private attorney and proceeded pro se to trial.

Conclusion of Law No. 1 reads as follows:

1. Petitioner's first ground for relief is that he was denied effective assistance of counsel. A review of the trial transcript of this case shows Petitioner waived his right to be represented by the Public Defender's Office and he also decided to represent himself instead of obtaining private counsel.

Therefore,

The Order Summarily Denying Rule 40 Petition Without Hearing filed on April 22, 2004 in the District Court of the First Circuit, Honolulu Division, is affirmed.

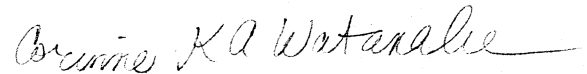
DATED: Honolulu, Hawai'i, July 15, 2005.

On the briefs:

Clayton K. Kimoto
for petitioner-appellant.

Anne K. Clarkin,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for respondent-appellee.


Chief Judge


Associate Judge


Associate Judge