

NO. 26754

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

THOMAS R. DAIGLE, Petitioner-Appellant, v.  
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT  
(S.P.P. NO. 04-1-0008;  
CR. NO. 50114)

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STATE OF HAWAI'I

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SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant pro se Thomas R. Daigle (Daigle) appeals from the "Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or Correct Judgment, Filed February 4, 2004, Without a Hearing" (Order) filed on July 27, 2004 in the Circuit Court of the First Circuit<sup>1/</sup> (circuit court). The Order denied Daigle's "Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" (Petition) filed on February 4, 2004, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

Daigle was indicted on March 30, 1977 in Cr. No. 50114 for Burglary in the First Degree, Rape in the Third Degree, and Assault in the Third Degree. Daigle was convicted of the three charges by a jury on August 12, 1977. On August 23, 1977, Daigle filed a Motion for Judgment of Acquittal or New Trial. Daigle

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<sup>1/</sup> The Honorable Virginia Lea Crandall presided.

claimed there was insufficient evidence to support the guilty verdicts and, in the alternative, requested a new trial because a new witness had been discovered who would testify that the complainant gave a different description of her assailant shortly after the assault on her. The circuit court<sup>2/</sup> denied the motion and sentenced Daigle to ten years of imprisonment for Burglary in the First Degree, five years of imprisonment for Rape in the First Degree, and one year of imprisonment for Assault in the Third Degree, all terms to run concurrently. The Judgment was filed on January 13, 1978.

On January 18, 1978, Daigle appealed his convictions, contending, among other things, that the complainant's identification of Daigle in a "show-up" at Daigle's home was impermissibly suggestive; the State failed to put on a prima facie case at trial for the rape charge; and the circuit court erred by failing to grant a new trial based on newly-discovered evidence that impeached the credibility of the complainant as to the physical characteristics of the assailant and based on the complainant's stating to a friend two weeks after Daigle's trial that another person had been her assailant. On December 21, 1979, the Hawai'i Supreme Court filed a Memorandum Opinion. The supreme court noted that the "paramount issue in this case concerns the reliability of the victim's pretrial identification"

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<sup>2/</sup> The Honorable Yoshimi Hayashi presided.

of Daigle. The supreme court further concluded there was "no reversible error"; the extrajudicial identification made by the complainant was positive and offered under circumstances devoid of impermissible suggestiveness; the cross-examination of the State's witnesses on this issue was thorough; the credibility of the witnesses and the weight of the evidence were for the jury to determine; and the trial court afforded Daigle an ample opportunity through post-trial motions to present evidence in support of his request for a new trial based on newly discovered evidence.

On February 8, 1980, the State filed a Motion for Execution of Judgment. In his March 3, 1980 Memorandum in Opposition to Execution of Judgment, Daigle stated that he intended to file a Petition for a Writ of Certiorari to the United States Supreme Court. Daigle failed to appear at the March 5, 1980 hearing on the State's Motion for Execution of Judgment, and the circuit court issued a bench warrant for Daigle.

On May 8, 1980, Daigle filed his Petition for a Writ of Certiorari based upon the premises that the extrajudicial identification of Daigle was unconstitutionally suggestive and the Hawai'i Supreme Court's ruling that the weight of the evidence was for the jury to determine was in error. The Supreme Court denied Daigle's petition on October 6, 1980.

Daigle was arrested in the State of Washington and extradited back to Hawai'i. On October 8, 2001, the circuit court granted the State's Motion for Execution of Judgment and mittimus was executed.

On March 21, 2002 and August 29, 2002, pursuant to HRPP Rule 35, Daigle filed motions for reconsideration of his sentence. After hearings on both motions, the circuit court denied both motions because, pursuant to HRPP Rule 35, the court had no jurisdiction.

On December 5, 2002, Daigle filed an HRPP Rule 40 petition in S.P.P. No. 02-1-0089; his sole ground for relief was that his counsel was ineffective because she informed him at the October 8, 2001 execution of his sentence that it was too late to file a motion for reconsideration. The circuit court denied his petition on September 22, 2003.

On February 4, 2004, Daigle filed the instant Petition, in which he alleged that (1) his constitutional right to effective assistance of counsel had been violated when his counsel failed to investigate his case for actual innocence and made a remark to the court that it was not likely that Daigle would "commit another crime again," thereby making it look like Daigle was guilty; (2) the police committed misconduct by conducting the "show-up" identification without informing Daigle, by tainting the complainant's memory by this "show-up," and by

conveying witnesses' testimony to the complainant who was outside the courtroom during the trial; and (3) new evidence discovered after his trial that the probable assailant had been located and the brother of the complainant had stated that complainant had fabricated her testimony supported his claim of innocence. On July 27, 2004, the circuit court denied Daigle's petition without a hearing and concluded that his Petition asserted no colorable claim.

On appeal, Daigle contends (1) the circuit court abused its discretion in denying his Petition because the lack of investigation by Daigle's trial counsel, which amounted to an ineffective assistance claim, gave rise to a colorable claim; (2) there was insufficient evidence that Daigle actually committed the crimes; and (3) the record shows that police coerced the complainant, by urging, advising, and badgering the complainant in repeated meetings, to obtain a false positive identification and testimony at trial, which resulted in Daigle's conviction.

The circuit court properly denied Daigle's Petition under HRPP Rule 40(a)(3).<sup>3/</sup> Therefore, the "Findings of Fact,

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<sup>3/</sup> Hawai'i Rules of Penal Procedure Rule 40(a)(3) provides:

**Rule 40. Post-conviction proceeding.**

. . . .

(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

(continued...)

Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or Correct Judgment, Filed February 4, 2004, Without a Hearing," filed on July 27, 2004 in the Circuit Court of the First Circuit, is affirmed.

DATED: Honolulu, Hawai'i, July 21, 2005.

On the briefs:

Thomas R. Daigle  
petitioner-appellant pro se.

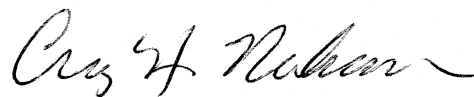
Ryan Yeh,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for respondent-appellee.



Acting Chief Judge



Associate Judge



Associate Judge

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<sup>3/</sup>(...continued)

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.