

NOS. 25908 & 25909

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

NO. 25908

DANTE V. LACUESTA, Petitioner-Appellant v.  
STATE OF HAWAI'I, Respondent-Appellee  
(S.P.P. No. 03-1-0013 (Cr. No. 00-1-1641))

AND

NO. 25909

DANTE V. LACUESTA, Petitioner-Appellant v.  
STATE OF HAWAI'I, Respondent-Appellee  
(S.P.P. No. 03-1-0012 (Cr. No. 99-1902))

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

SUMMARY DISPOSITION ORDER

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

In this consolidated appeal, Petitioner-Appellant Dante V. Lacuesta (Lacuesta) appeals from the following:

S. Ct. No. 25908 -- Lacuesta appeals from the following orders filed in S.P.P. 03-1-0013 (Cr. No. 00-1-1641)<sup>1/</sup>: (1) "Findings of Fact, Conclusions of Law, and Order Dismissing in Part and Granting in Part, Hearing on Petition for Post-Conviction Relief" filed on April 21, 2003 in the Circuit Court of the First Circuit (circuit court); (2) "Order Denying Petitioner's Motion for Reconsideration of Findings of Fact,

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<sup>1/</sup> The Honorable Marie N. Milks presided in S.P.P. Nos. 03-1-0012 and 03-1-0013 and in the two underlying criminal cases, 99-1902 and 00-1-1641, respectively.

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Conclusions of Law, and Order Dismissing in Part and Granting in Part, Hearing on Petition for Post-Conviction Relief filed 4/21/03" filed on May 5, 2003 in the circuit court; and (3) "Findings of Fact, Conclusions of Law, and Order Dismissing Ground 'F' of Petitioner's Petition for Post-Conviction Relief" filed on June 13, 2003 in the circuit court.

S. Ct. No. 25909 -- Lacuesta appeals from the following order filed in S.P.P. 03-1-0012 (Cr. No. 99-1902): "Findings of Fact, Conclusions of Law, and Order Dismissing Petition for Post-Conviction Relief" filed on June 13, 2003 in the circuit court.

In Lacuesta's Petitions for Post-Conviction Relief filed in S.P.P. No. 03-1-0012 and S.P.P. No. 03-1-0013, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40, he alleges the same grounds for both petitions; therefore, we will collectively refer to both petitions as "Petition."

On appeal, Lacuesta contends five grounds exist upon which he is entitled to relief:

- (1) The circuit court erred in denying Lacuesta a hearing on Ground "B" of the Petition and restricting the evidence that could be considered on the Petition, particularly the evidence of the tape-recorded statements of co-defendant Jonathon Pascua (Pascua).
- (2) The circuit court erred in denying a hearing on Ground "C," thereby preventing the record from corroborating the claims that Pascua was telling the truth when he told several other individuals, including his attorney, Lacuesta, Lacuesta's attorney, and at least nine other witnesses that the handgun was his and that he, not Lacuesta, was

in possession of it at the scene, and thus preventing consideration of such evidence in the Petition proceeding.

- (3) The circuit court erred in denying the Petition on Ground "A" on the basis that the cumulative evidence, including Aiulu Ah-Key's (Ah-Key) recantation, meant that there was no credible evidence to support the jury verdict.
- (4) The circuit court erred in failing to provide Lacuesta due process by the exclusion of the evidence set forth above.
- (5) The circuit court erred in denying Lacuesta due process because the court was biased against him.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude:

(1) Lacuesta was not entitled to an HRPP Rule 40 hearing on Ground "B" because Pascua's tape-recorded statements, which would not have been admissible at trial, do not establish a colorable claim. State v. DeGuair, 108 Hawai'i 179, 186-87, 118 P.3d 662, 669-70 (2005); State v. Christian, 88 Hawai'i 407, 967 P.2d 239 (1998); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973); Hawai'i Rules of Evidence Rule 804(b)(3) (1993).

(2) Lacuesta's Ground "C" contention that the trial court improperly excluded defense witnesses has been previously raised and ruled upon. HRPP Rule 40(a)(3) (2003).

(3) The circuit court did not err in finding that Ah-Key's recantation under Ground "A" was not credible. "[I]t is

well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trial judge." State v. Buch, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996) (internal quotation marks and citation omitted).

(4) Lacuesta's contention that the trial court had a definite and distinct bias against him has been previously raised and ruled upon. Any additional contentions of bias made by Lacuesta are patently frivolous and without a trace of support in the record or evidence submitted by Lacuesta. HRPP Rule 40 (2003).

Therefore,

IT IS HEREBY ORDERED that: (1) the (a) "Findings of Fact, Conclusions of Law, and Order Dismissing in Part and Granting in Part, Hearing on Petition for Post-Conviction Relief" filed on April 21, 2003; (b) "Order Denying Petitioner's Motion for Reconsideration of Findings of Fact, Conclusions of Law, and Order Dismissing in Part and Granting in Part, Hearing on Petition for Post-Conviction Relief filed 4/21/03" filed on May 5, 2003; and (c) "Findings of Fact, Conclusions of Law, and Order Dismissing Ground "F" of Petitioner's Petition for Post-Conviction Relief" filed on June 13, 2003, in S.P.P. 03-1-0013 (Cr. No. 00-1-1641); and (2) the "Findings of Fact, Conclusions of Law, and Order Dismissing Petition for Post-Conviction Relief"

filed on June 13, 2003 in S.P.P. 03-1-0012 (Cr. No. 99-1902), in the Circuit Court of the First Circuit, are affirmed.

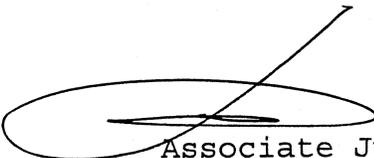
DATED: Honolulu, Hawai'i, January 20, 2006.

On the briefs:

Mark S. Kawata  
for Petitioner-Appellant.

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

  
Acting Chief Judge

  
Associate Judge

  
Associate Judge