

NO. 26149

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

RAITA FUKUSAKU, Petitioner-Appellant, v.  
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(S.P.P. NO. 02-1-0087)

FILED  
2006 SEP 12 AM 8:32  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

SUMMARY DISPOSITION ORDER

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

Raita Fukusaku (Appellant) appeals the May 30, 2003 order of the Circuit Court of the First Circuit (circuit court)<sup>1</sup> that denied, without a hearing, his November 22, 2002 Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2002) petition for post-conviction relief (Rule 40 Petition). In the Rule 40 Petition, Appellant sought to vacate his double murder convictions because of purportedly perjured testimony given at his jury trial.

After a meticulous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we dispose of Appellant's points of error on appeal as follows:

1. Regardless of whether the analysis proceeds under State v. McNulty, 60 Haw. 259, 588 P.2d 438 (1978), or under State v. Teves, 5 Haw. App. 90, 679 P.2d 136 (1984), Appellant is not entitled to a new trial, because there is no reasonable possibility the purportedly perjured testimony contributed to

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<sup>1</sup> The Honorable Dan T. Kochi presided.

would not have called [the witness] if they had knowledge[.]"  
Second Amended Opening Brief at 23. Appellant's due process  
claim cannot stand for this alternative reason. See Napue, 360  
U.S. at 269 (due process applies where the state "knowingly  
use[s] false evidence, including false testimony, to obtain a  
tainted conviction"); In re Carvelo, 44 Haw. 31, 38, 352 P.2d  
616, 623 (1959) (Napue is applicable where "the defendant was  
convicted on perjured testimony known to be false by the  
prosecution at the time of the trial").

3. Accordingly, Appellant's Rule 40 Petition is  
"without trace of support either in the record or from other  
evidence submitted by the petitioner[,]" HRPP Rule 40(f), and the  
circuit court's order denying the Rule 40 Petition without a  
hearing was therefore correct. Barnett v. State, 91 Hawai'i 20,  
26, 979 P.2d 1046, 1052 (1999).

Therefore,

IT IS HEREBY ORDERED that the circuit court's May 30,  
2003 order denying the Rule 40 Petition is affirmed.

DATED: Honolulu, Hawai'i, September 12, 2006.

On the briefs:

Myles S. Breiner,  
for Petitioner-Appellant.

Donn Fudo,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Respondent-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge