

NOT FOR PUBLICATION

NO. 26572

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

JEFFREY O. TERRY, Petitioner-Appellant, v
STATE OF HAWAI'I, Respondent-Appellee

KHAMAKADO
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STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 02-01-0073 (Cr. No. 88-0951))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Jeffrey O. Terry (Terry) appeals from the "Findings of Fact, Conclusions of Law, and Order Summarily Denying Petition for Post-Conviction Relief, Filed January 16, 2003, Amended Petition Filed March 27, 2003, Second Amended Petition Filed June 26, 2003, and Third Amended Petition Filed August 28, 2003, Without a Hearing" filed on April 15, 2004 in the Circuit Court of the First Circuit (circuit court).^{1/} On appeal, Terry argues that (1) the indictment failed to sufficiently allege one or more critical components of a material element of Attempted Murder in the First Degree (Count III), (2) the circuit court did not properly evaluate and determine Terry's competence to stand trial, (3) the circuit court failed to properly advise Terry at the change of plea hearing of the maximum extended terms of imprisonment, and (4) the circuit court

^{1/} The Honorable Virginia Lea Crandall presided.

failed to make an adequate record to show it made and entered findings of fact and conclusions of law before enhancing Terry's sentence from ten years to twenty.

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 as raised by the parties, we conclude that by not timely raising these four issues, Terry had in fact waived them. In January 2003, Hawai'i Rule of Penal Procedure (HRPP) Rule 40(a)(3) stated:

(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. An issue is 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.

(Emphasis added.) By the plain and unambiguous language of HRPP Rule 40, Terry had many realistic opportunities to raise these four issues. He could have raised the issues during his plea negotiations, at his change of plea hearing, or, in the alternative, at his sentencing hearing. And lastly, Terry could have raised the issues on appeal. Terry chose none of these avenues. Instead, he chose to wait over twelve years before he raised the issues. The Hawai'i Supreme Court has held that where a Rule 40 petitioner alleges a ground for relief that was not

raised in a prior proceeding, or was previously ruled upon, the issue will be deemed waived where the petitioner fails to (1) raise the issue on appeal, (2) present any facts to rebut the presumption that the failure to raise that issue was made knowingly, and (3) prove the existence of extraordinary circumstances to justify the failure to raise the issue. Stanley v. State, 76 Hawai'i 446, 451, 879 P.2d 551, 556 (1994). Therefore, under HRPP Rule 40, Terry has waived his right to appeal these four issues.

Based on the foregoing, we affirm the "Findings of Fact, Conclusions of Law, and Order Summarily Denying Petition for Post-Conviction Relief, Filed January 16, 2003, Amended Petition Filed March 27, 2003, Second Amended Petition Filed June 26, 2003, and Third Amended Petition Filed August 28, 2003, Without a Hearing" filed on April 15, 2004 in the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, February 24, 2006.

On the briefs:

Jeffrey O. Terry,
Petitioner-Appellant pro se.

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent-Appellee.


Acting Chief Judge


Associate Judge


Associate Judge