

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26663

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

RONALD GOMES, Petitioner-Appellant, v.  
STATE OF HAWAI'I, Respondent-Appellee

NORMA T. YARA  
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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(S.P.P. NO. 03-1-0023(2))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Ronald Gomes (Gomes) appeals from the Order Denying H.R.P.P. Rule 40 Petition to Vacate, Set Aside or Correct Illegal Sentence filed on May 19, 2004 in the Circuit Court of the Second Circuit<sup>1/</sup> (circuit court). Gomes filed his Petition to Vacate, Set Aside or Correct Judgment or to Release Petitioner from Custody (Rule 40 Petition) on December 23, 2003 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, Cr. No. 91-0374, Gomes was charged with Sexual Assault in the First Degree and Murder in the Second Degree. On June 26, 1992, Gomes entered a no contest plea to the charge of Murder in the Second Degree; as part of the plea, Gomes stipulated that there was a factual basis for the charge and the State agreed to dismiss the Sexual Assault in the First Degree charge.

On August 24, 1992, Gomes filed a motion to withdraw his plea, which motion was denied. The circuit court convicted

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<sup>1/</sup> The Honorable Shackley F. Raffetto presided.

Gomes of Murder in the Second Degree and sentenced him to life imprisonment with the possibility of parole. Judgment was filed on August 27, 1992.

Gomes appealed the denial of the motion to withdraw his no contest plea. On June 9, 1995, the Hawai'i Supreme Court in No. 16476 vacated the judgment and remanded the case to the circuit court for issuance of an order granting Gomes' motion to withdraw his no contest plea.

Jury trial began on April 23, 1996. The jury found Gomes guilty of Sexual Assault in the First Degree and, instead of Murder in the Second Degree, found Gomes guilty of the included offense of Manslaughter. The circuit court sentenced Gomes to concurrent terms of life imprisonment on the sexual assault charge and twenty years of imprisonment on the Manslaughter charge and entered the Judgment on July 5, 1996.

On July 22, 1996, Gomes filed an appeal from the judgment. Gomes raised the following issues: (1) his statements to the police were involuntary; (2) the circuit court failed to take judicial notice of weather conditions; (3) his extended term sentence was based on improper information regarding his prior record; (4) his inadmissible statements to the panel of three psychologists were improperly relied upon in his sentencing; (5) he did not receive adequate notice of the grounds relied upon in extended sentencing; (6) no evidence was presented to support extended terms; (7) the extended term sentencing was improper;

(8) no findings of fact for extended term sentencing were made; and (9) his resentencing should have done by a different judge.

On October 7, 1998, the Hawai'i Supreme Court in No. 20010 issued a Summary Disposition Order affirming Gomes's conviction and sentence. The Notice and Judgment on Appeal was entered on October 22, 1998.

On July 7, 1999, in S.P.P. 99-0008, Gomes filed a Motion to Correct and Reduce Sentence ("First Rule 35 Proceeding") pursuant to HRPP Rule 35. Gomes argued that because he had no prior conviction, the extended term under HRS § 706-606.5(1) was illegal. On July 30, 1999, the circuit court issued an Order Denying Defendant's Motion to Correct or Reduce Sentence. Gomes filed a notice of appeal from the order on August 12, 1999. In his appeal, Gomes claimed: (1) the sentence imposed was illegal pursuant to HRS § 701-109 because both of the offenses stemmed from the same incident and were therefore the same offense (manslaughter and sexual assault); (2) he was improperly sentenced to an extended term based on 1974 "youthful barbrawls" or prior "minor infractions" of his youth, (3) he was improperly sentenced to an extended term without a hearing; and (4) there was not enough evidence to sentence him to an extended term. On June 28, 2000, the Hawai'i Supreme Court issued a Summary Disposition Order in No. 22774 and affirmed the circuit court's denial of Gomes's motion, stating that the circuit court did not err (1) in allowing Gomes to be convicted of both Sexual

Assault in the First Degree and Manslaughter and (2) in imposing extended terms of imprisonment pursuant to HRS § 706-662(4).

Gomes filed a petition for writ of habeas corpus on October 5, 2000 and a reply brief on January 9, 2001 in the United States District Court for the District of Hawai'i. Gomes claimed that (1) his double jeopardy rights were violated because sexual assault and manslaughter were included offenses if committed in the same time period and (2) he was illegally sentenced to an extended term because he did not have a prior felony conviction and the extended term was not raised in the indictment or determined by the jury, in violation of due process rights under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

On February 20, 2003, Magistrate Judge Kurren issued Findings and Recommendation to Deny Petition for Writ of Habeas Corpus, finding that no double jeopardy violation existed; Gomes's extended term sentencing as a multiple offender complied with HRS § 706-662(4)(a), the statute under which he was sentenced; and Gomes's petition should be dismissed with respect to the Apprendi claim for failure to exhaust state remedies. District Judge Mollway issued an order denying Gomes's petition on March 17, 2003. On April 21, 2003, Gomes filed a Notice of Certiorari, which the district court construed as a request for the court to grant a certificate of appealability; the district court denied the request on April 22, 2003. Gomes appealed to the United States Court of Appeals for the Ninth

Circuit, and on July 28, 2003, the Ninth Circuit denied Gomes's request for the certificate of appealability.

On December 22, 2003, Gomes filed a Petition to Correct Illegally Imposed Sentence and Conviction Pursuant to Hawaii Appellate Procedure Rule 35 ("Second Rule 35 Proceeding") in the circuit court. Gomes asserted that his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and articles 5, 8, and 14 of the Hawai'i Constitution had been violated because (1) the circuit court had convicted Gomes of Sexual Assault in the First Degree after this charge had been dropped in the earlier plea agreement, thereby violating his right not to be placed in double jeopardy, and (2) under Apprendi, the factors underlying his extended term sentence should have been found by the jury rather than the judge. The State filed its response on January 14, 2004, and Gomes filed his reply brief on February 12, 2004.

On February 12, 2004, Gomes filed an Ex Parte Motion to Remove Trial Judge from This Case to Avoid Possible Prejudice, claiming a violation of his due process rights because the judge assigned to his Second Rule 35 Proceeding was the same judge who had presided at his trial and sentenced him.

On March 8, 2004, the circuit court issued orders denying Gomes's (1) motion to remove the trial judge, stating that Gomes did "not allege any factual or legal basis to require the recusal" of the judge, and (2) Second Rule 35 Proceeding, stating that his double jeopardy rights were not violated because

while the "offenses were committed in the same criminal transaction, they were not the same conduct"; "[n]one of the factors referenced by the trial court in imposing the extended sentence were required to be found by the jury"; and the circuit court had made "its findings after notice to Gomes by the State of its intent to seek extended term sentencing and after a hearing held for that purpose."

Gomes timely appealed from the denial of his Second Rule 35 Proceeding. In his opening brief in No. 26466, Gomes claimed error in the following issues: (1) his conviction for the sexual assault charge after that charge had been dismissed pursuant to his earlier plea agreement was in violation of double jeopardy; (2) his sentence to an extended term was illegal because he was innocent and because he did not have an underlying felony conviction; and (3) his sentence to an extended term by a judge rather than a jury was in violation of Apprendi. State v. Gomes, 107 Hawai'i 253, 256-58, 112 P.3d 739, 742-44 (App. 2005) (Gomes I), aff'd on other grounds, State v. Gomes, 107 Hawai'i 308, 113 P.3d 184, reconsideration denied, 107 Hawai'i 468, 115 P.3d 148 (2005) (Gomes II).

On March 23, 2005, this court affirmed the circuit court's order denying Gomes's Second Rule 35 Proceeding. Gomes I, 107 Hawai'i at 259, 112 P.3d at 745. Gomes filed a writ of certiorari to the Hawai'i Supreme Court on April 6, 2005. Gomes II, 107 Hawai'i at 309, 113 P.3d at 185.

In its May 26, 2005 Opinion, the Hawai'i Supreme Court affirmed the non-Apprendi-related points of error in Gomes I; however, as to the Apprendi-related issues, the supreme court held that Apprendi did not apply retroactively in this jurisdiction to cases on collateral attack and affirmed Gomes I although on the the grounds stated in Gomes II. Gomes II, 107 Hawai'i at 314, 113 P.3d at 190.

On December 23, 2003, Gomes filed his Rule 40 Petition, in which he alleged:

A. Ground One: Trial judge answered petitions raised in previously submitted petitions [sic]. Answering his own verdicts and or [sic] sentences, the verdict in any subsequent petition should be considered bias and a true and lawful decision had not been reached in these cases.

B. Gound Two: Prosecutorial [sic] misconduct. At trial, the prosecuting attorney stated, that the clothing worn by the defendant was not available to be placed into evidence, when indeed this clothing had been in the hands of the police, according to court documents. Would the prosecuting attorney allowed the evidence of the clothing worn by the defendant on the day of the alleged crime, the outcome of this case would have been different. By subpressing [sic] this exculpatory evidence and insisting that these clothing articles were available [sic], the prosecuting attorney herewith committed perjury.

Gomes did not attach to the Rule 40 Petition any transcripts, record references, police reports, or any other evidence related to his claims.

On March 22, 2004, the State filed a response in which it argued that the issues were waived or frivolous; even if the claims were not waived, they were without merit; Gomes failed in his burden to present evidence in support of his claims, as he advanced nothing but mere speculation; and Gomes failed to establish how the absence of any purported misconduct would have

benefitted his case. The State also argued that the clothing in question was listed as an exhibit on its trial exhibit list.

On April 19, 2004, Gomes filed a reply brief. He argued that the clothing he was wearing on the date of the alleged murder was available; had the clothing been tested, it would have shown his blood was not on it; and if the clothing had been entered into evidence at trial, it would have exculpated him. He also argued that the prosecutor had stated at trial that the clothing worn by him was not available to be placed into evidence; however, this court is unable to locate the citation in the trial record to which Gomes refers in support of this argument. Gomes attached an affidavit from his former wife stating that (1) the prosecuting attorney had shown her the items of clothing on the night of the alleged murder at the office of the prosecuting attorney, (2) the prosecuting attorney had asked her if the clothing items belonged to Gomes and if Gomes had worn them on the date in question, and (3) she had told the prosecuting attorney that the items were the ones she had ironed prior to Gomes's leaving that night.

On May 19, 2004, the circuit court denied the Rule 40 Petition, stating in part that it was taking "judicial notice of the records and files under Cr. No. 91-0374(2), which case underlies the instant Petition, as well as the records and files under S.P.P. No. 99-0008(2), Motion to Correct and Reduce Sentence" and that as to the specific grounds Gomes raised in his Rule 40 Petition:

In the instant petition, Ground #1 must be deemed waived, as it was not raised prior to the petition's filing date. Petitioner could have raised the issue in the federal habeas petition as a due process violation or in the Second Rule 35 Proceeding.

Ground #2 must be deemed waived, as it was not raised prior to the petition's filing date. Petitioner could have raised the evidentiary issue on direct appeal, at the First Rule 35 Proceeding, at the federal habeas proceeding or at the Second Rule 35 Proceeding.

In addition, Petitioner fails to state any colorable claim, as the issues are patently frivolous and without merit.

. . . Petitioner alleges no facts and provides no transcript references or any other support in or out of the record.

Therefore, it is clear from the record that Petitioner's two grounds listed in the instant petition are patently frivolous and have been waived.

On appeal, Gomes contends: (1) the prosecuting attorney committed perjury by stating that he did not have Gomes's clothing and that Gomes had actually disposed of the clothing he had worn on the day of the alleged murder; (2) the newly discovered evidence in the form of the affidavit of Gomes's ex-wife clearly states that she actually had knowledge that the clothing worn by Gomes on the day of the alleged murder had been in the possession of the prosecuting attorney; and (3) Gomes's sentence of life imprisonment with the possibility of parole was in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

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 hold that the circuit court properly denied Gomes's Rule 40 Petition as Gomes's claims were "previously ruled upon or were

waived." HRPP Rule 40(a)(3). Additionally, Gomes's claims were "patently frivolous and . . . without trace of support either in the record or from other evidence submitted by the petitioner." HRPP Rule 40(f).

Therefore,

The Order Denying H.R.P.P. Rule 40 Petition to Vacate, Set Aside or Correct Illegal Sentence filed on May 19, 2004 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 28, 2006.

On the briefs:

Ronald Gomes,  
Petitioner-Appellant pro se.

  
Chief Judge

Arleen Y. Watanabe,  
Deputy Prosecuting Attorney,  
County of Maui,  
for Respondent-Appellee.

  
Associate Judge

  
Associate Judge