NO. 26821

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

CHAD EVERETT VANSTORY aka "VIKING," Petitioner-Appellant,
v. STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 04-1-0011(1) (Cr. Nos. 97-0515(1) & 97-0706(1)))

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Watanabe and Foley, JJ.)

Petitioner-Appellant Chad Everett Vanstory aka "Viking" (Vanstory) appeals from the "Findings of Fact, Conclusions of Law, and Decision and Order Dismissing HRPP Rule 40 Petition Filed on April 30, 2004," filed August 26, 2004 in the Circuit Court of the Second Circuit[1/] (circuit court). Vanstory filed his Petition for Post-Conviction Relief (Rule 40 Petition) on April 30, 2004 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

On August 22, 1997, Vanstory was indicted in Cr. No. 97-0515(1) for Robbery in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 708-840(1)(b)(ii) (1993) (Count One), and Carrying or Use of Firearm in the Commission of a Separate Felony (Carrying/Use of Firearm), in violation of HRS § 134-6(a) (Supp. 1998) (Count Two).

On November 17, 1997, Vanstory was indicted in Cr. No. 97-0706(1) for Fugitive in Possession of a Firearm (Count One)

[1/] The Honorable Joel E. August presided.

and Fugitive in Possession of Firearm Ammunition (Count Three), both in violation of HRS § 134-7(a) (Supp. 1997); and Felon in Possession of Firearm (Count Two) and Felon in Possession of Firearm Ammunition (Count Four), both in violation of HRS § 134-7(b) (Supp. 1997).

The two cases were consolidated for trial. A jury convicted Vanstory on all counts as charged in both criminal numbers. The circuit court granted in part Vanstory's Motion for Judgment of Acquittal and dismissed Counts One and Three of Cr. No. 97-0706(1).

Prior to Vanstory's sentencing, the State filed motions for extended and/or consecutive terms of imprisonment on all counts and for a mandatory minimum term of imprisonment as to the robbery charge in Cr. No. 97-0515(1). The circuit court sentenced Vanstory to twenty years of imprisonment as to each of Counts One and Two in Cr. No. 97-0515(1) and ten years of imprisonment as to each of Counts Two and Four in Cr. 97-0706(1), with a mandatory minimum term of imprisonment of fifteen years. The circuit court also ordered that all sentences were to run concurrently and that Vanstory should pay restitution in the amount of $19,258.00.

Vanstory appealed and argued that (1) the circuit court's jury instructions erroneously failed to define "semiautomatic firearm" as required by HRS §§ 706-660.1(3) and 706-660.1(4)(c), and (2) the circuit court erroneously imposed a

mandatory minimum term of imprisonment for Robbery in the First Degree.

On June 30, 1999, the Hawai'i Supreme Court in No. 21630 rendered a decision in which it reversed the robbery conviction and sentence in Cr. No. 97-0515(1). State v. Vanstory, 91 Hawai'i 33, 49, 979 P.2d 1059, 1075 (1999). The supreme court held that "Vanstory's conviction and sentence under HRS § 708-840 is an included offense under HRS § 134-6(a)" and therefore "his convictions under both HRS §§ 134-[6](a) and 708-840 violate HRS § 701-109(1)(a)." Vanstory, 91 Hawai'i at 48-49, 979 P.2d at 1074-75. The court also held that the aggravating circumstance of a semiautomatic pistol was not proved and, therefore, the circuit court erred in sentencing Vanstory to a mandatory minimum term of imprisonment as required when a semiautomatic pistol is involved in the commission of a felony. Id. at 49-51, 979 P.2d at 1075-77. The court withheld judgment on Count Two of Cr. No. 97-0515(1) and Count Two of Cr. No. 97-0706(1) for thirty days to allow the State to decide whether it would consent to resentence Vanstory without a mandatory minimum term for the use of a semiautomatic firearm or retry Vanstory. Id. at 51, 979 P.2d at 1077. The court affirmed Vanstory's conviction under Count Four of Cr. No. 97-0706(1). Id.

On June 9, 2000, pursuant to the Opinion of the Hawai'i Supreme Court, the circuit court resentenced Vanstory, without a mandatory minimum term of imprisonment for the use of a semiautomatic firearm, as follows: in Cr. No. 97-0515(1), to an

indeterminate term of twenty years of imprisonment on Count Two; and in Cr. No. 97-0706(1), to ten years of imprisonment on each of Counts Two and Four. The circuit court ordered that the sentences run concurrently, with credit for time served, and that Vanstory shall pay restitution of $19,258.00. Judgment was filed on June 13, 2000.

On April 30, 2004, Vanstory filed his Rule 40 Petition (S.P.P. No. 04-1-0011(1)) and a separate memorandum, in which he alleged:

(1) the Judgment violated his constitutional rights to due process and equal protection of the law under the United States and Hawai'i Constitutions because (a) the Carrying/Use of Firearm charge in Cr. No. 97-0515(1) should have been dismissed instead of the Robbery in the First Degree charge and (b) to justify an enhanced sentence, the circuit court should have made a finding that the firearm involved was a semiautomatic;

(2) the twenty-year sentence imposed for Count Two of Cr. No. 97-0515(1) (Carrying/Use of Firearm) violated his constitutional rights to due process and equal protection of the law under the United States and Hawai'i Constitutions because (a) the indictment did not specify the class of the felony and (b) the circuit court was not authorized under HRS § 134-6 to resentence him to an indeterminate term of twenty years of imprisonment; and

(3) the sentences imposed for Counts Two and Four of Cr. No. 97-0706(1) were illegal and in violation of his

constitutional rights to due process and equal protection of the law under the United States and Hawai'i Constitutions because (a) HRS § 134-11 (which provides in pertinent part that HRS §§ 134-6 to 134-9 shall not apply to "members of police departments, sheriffs . . . and law enforcement officers") violated his right to equal protection of the law and (b) the Hawai'i Supreme Court in Vanstory, 91 Hawai'i at 50, 979 P.2d at 1076, stated that the Felon in Possession of a Firearm and Firearm Ammunition charges were class C felonies.

On June 24, 2004, in S.P.P. 04-1-0011(1), Vanstory filed, pursuant to HRPP Rule 35, a Motion to Correct Illegal Sentence Pertaining to the Restitution Order. Vanstory argued his sentence was illegal because the circuit court (a) failed to make any finding that he could afford to pay the ordered restitution and (b) improperly delegated the judicial function of determining the manner of payment to the Department of Public Safety.

The State filed its response to the Rule 40 Petition on August 2, 2004.

On August 23, 2004, Vanstory filed an Ex Parte Motion to Extend Time to File Petitioner's Traverse [sic] to State's Response to Petitioner's Petition for Post-Conviction Relief. The circuit court denied the motion on August 26, 2004.

On August 26, 2004, the circuit court filed its Findings of Fact, Conclusions of Law, and Decision and Order

Dismissing HRPP Rule 40 Petition (Order Dismissing Rule 40 Petition). The circuit court concluded that:

(1) Vanstory's first claim lacked merit because the Hawai'i Supreme Court had already ruled on this ground in State v. Vanstory, supra.

(2) Vanstory's second claim was without merit because (a) Vanstory failed to raise prior to trial, at trial, or on appeal the issue of "fair notice as to what classes of felonies he was being charged with" and therefore waived this issue; (b) the indictments were sufficient pursuant to HRS § 806-34 and State v. Moore, 82 Hawai'i 202, 921 P.2d 122 (1996); and (c) the Hawai'i Supreme Court in Vanstory specifically affirmed his conviction for Carrying/Use of Firearm on the basis of HRS § 134-6(a) and (e).

(3) Vanstory's third claim was without merit because (a) his sentences for Counts II and IV of Cr. No. 97-0706(1) were legal because the sentences complied with the statutory requirements for imposing the sentences, State v. Delmondo, 67 Haw. 531, 532, 696 P.2d 344, 345 (1985), and the circuit court was authorized to impose such sentences, State v. Kahalewai, 71 Haw. 624, 625, 801 P.2d 558, 560 (1990); and (b) the circuit court was authorized by HRS § 134-7(b) and (h) to impose the ten-year sentences and the Hawai'i Supreme Court affirmed Vanstory's convictions for these offenses.

On September 13, 2004, Vanstory filed a notice of appeal from the Order Dismissing Rule 40 Petition.

On August 31, 2004, the State filed its response to the Motion to Correct Illegal Sentence Pertaining to the Restitution Order. On September 20, 2004, Vanstory filed an Ex Parte Motion to Extend Time to File Petitioner's Traverse [sic] to State's Response Pertaining to Restitution Order. The circuit court denied the ex parte motion on September 27, 2004.

On September 27, 2004, the circuit court entered its Findings of Fact, Conclusions of Law, and Decision and Order Granting Petitioner's Motion to Correct Illegal Sentence Pertaining to the Restitution Order. The circuit court vacated only the restitution portion of Vanstory's sentence and ordered that he be resentenced to specifically determine the amount he was able to pay and the manner of payment. After the resentencing hearing, the circuit court, on December 3, 2004, entered its Findings of Fact, Conclusions of Law, and Order Regarding Defendant's Payment of Restitution. The circuit court concluded that Vanstory's income while he was incarcerated was subject to garnishment for payment of restitution, the $19,258.00 restitution amount was one that Vanstory could afford to pay, and the manner of payment was reasonable and one which Vanstory could afford. On December 9, 2004, Vanstory filed a notice of appeal from the Findings of Fact, Conclusions of Law, and Order Regarding Defendant's Payment of Restitution. The restitution issue is the sole issue in appeal No. 27021.

On March 24, 2005, Vanstory filed his Opening Brief in the instant appeal. On December 6, 2005, Vanstory filed his Amended Opening Brief, in which he contended:

(1) Because the Robbery in the First Degree charge was a necessary included offense of Carrying/Use of Firearm and his conviction for the robbery charge was reversed by the Hawai'i Supreme Court, he should not have been convicted of the Carrying/Use of Firearm charge because there was no commission of an underlying felony (robbery charge) as required under HRS § 134-6(a).

(2) His appellate counsel was ineffective for failing to raise the argument in paragraph (1) above in State v. Vanstory, supra (Vanstory did not raise this issue in his Rule 40 Petition and raises it for the first time in this appeal).

(3) Before sentencing him on the Carrying/Use of Firearm charge, the circuit court failed to establish or reference the underlying felony charge in relation to the Carrying/Use charge and the indictment did not specify the class of the felony for the charge.

(4) The sentences imposed for Counts Two and Four were illegal and in violation of his constitutional rights to due process and equal protection of the law under the United States and Hawai'i Constitutions because (a) HRS § 134-11 (which states that §§ 134-6 to 134-9 shall not apply to law enforcement officers, military personnel, and pardoned persons) violated his right to equal protection of the law and (b) the Hawai'i Supreme

Court in Vanstory, 91 Hawai'i at 50, 979 P.2d at 1076, stated that the Felon in Possession of a Firearm and Firearm Ammunition charges were class C felonies.

(5) The circuit court abused its discretion and violated his right to due process when it failed to give him written notice of the deficiencies in his Rule 40 Petition or an opportunity to clarify his Rule 40 Petition, as required under HRPP Rule 40(e).

(6) The circuit court abused its discretion and violated his right to due process when it declined to review sua sponte his argument that under the rulings in State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), and State v. Christian, 88 Hawai'i 407, 967 P.2d 239 (1998), his claims were meritorious and not patently frivolous without a trace of support in the record.

(7) The circuit court abused its discretion when it failed to grant him a hearing on his Rule 40 Petition.

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 Vanstory's Rule 40 Petition as Vanstory'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 "Findings of Fact, Conclusions of Law, and Decision and Order Dismissing HRPP Rule 40 Petition Filed on April 30,

2004," filed August 26, 2004 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, September 18, 2006.

On the briefs:

Chad Everett Vanstory,
Petitioner-Appellant pro se.

Benjamin M. Acob,
First Deputy Prosecuting Attorney,
County of Mau'i,
for Respondent-Appellee.

James A Burns
Chief Judge

Corinne K A Watanabe
Associate Judge

Daniel R. Foley
Associate Judge