

NO. 26923

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

CALVIN D. ELIZARES, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 03-1-0025(2))

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

Defendant-Appellant Calvin D. Elizares (Elizares) appeals from the Findings of Fact, Conclusions of Law, and Judgment Denying Rule 40 Petition for Post-Conviction Relief, filed in the Circuit Court of the Second Circuit (circuit court)^{1/} on October 19, 2004. Elizares filed his Petition for Post-Conviction Relief (Rule 40 Petition) on December 26, 2003, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In his points on appeal, Elizares argues:

(1) The circuit court's Finding of Fact 5 was clearly erroneous and his convictions were thereby improperly admitted into evidence by stipulation.

(2) The circuit court's Conclusion of Law 3 was wrong. He argues that he received ineffective assistance of counsel

^{1/} The Honorable Shackley F. Raffetto presided.

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CHIEF, APPELLATE COURTS
STATE OF HAWAII

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because his counsel failed to inform him of the Hawai'i Supreme Court's decision on his writ of certiorari until a year after the decision had been entered, in violation of the time requirements of Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(b), and he was therefore denied the opportunity to exhaust his appeal process pursuant to HRAP Rule 28(4)(c) [sic]. His counsel's failure to timely inform him denied him a timely challenge to the denial of his motion for mistrial due to juror misconduct.

(3) The circuit court's Conclusion of Law 4 was wrong. Elizares claims the circuit court abused its discretion by failing to investigate juror misconduct and his counsel was ineffective because counsel failed to call a law clerk to testify at the juror misconduct hearing.

(4) The circuit court's Conclusion of Law 6 was wrong. Elizares claims he was unable to raise the errors in this Conclusion of Law prior to his Rule 40 Petition because his trial and appeal counsel were the same person.

(5) The circuit court should have granted him a hearing on his Rule 40 Petition.

Upon careful review of the record and the briefs submitted by the parties, we hold that:

(1) Elizares did not raise in his prior appeal his claim that the stipulation of his prior felony was improperly

entered into evidence; consequently, he waived this claim. HRPP Rule 40(a)(3).

(2) Elizares' claim that the circuit court's Conclusion of Law 3 was wrong is without merit. The circuit court correctly held that the claim was frivolous and without merit. HRPP Rule 40(a)(3).

(3) Since Elizares did not raise Ground Five, sections C, D, E, and L, and Ground Ten, subpart 11, in his prior appeal, these claims were waived, and therefore the circuit court was not required to assess the merits of those claims in Elizares' Rule 40 petition. HRPP Rule 40(a)(3).

(4) Because Elizares had the same attorney at trial and on direct appeal, the circuit court erred by holding that Elizares waived the claims he raised in Ground Ten of his Rule 40 Petition when he did not raise them in a prior proceeding.

Briones v. State, 74 Haw. 442, 460, 848 P.2d 966, 975 (1993).

However, these claims were not colorable, and, hence, the circuit court did not err by failing to grant Elizares a hearing on them.

Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999);

HRPP Rule 40(f).

Therefore,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Judgment Denying Rule 40 Petition for

Post-Conviction Relief, filed in the Circuit Court of the Second Circuit on October 19, 2004, is affirmed.

DATED: Honolulu, Hawai'i, May 23, 2006.

On the briefs:

Calvin D. Elizares,
Petitioner-Appellant pro se.

Artemio C. Baxa,
Deputy Prosecuting Attorney,
County of Maui,
for Respondent-Appellee.


Chief Judge


Associate Judge


Associate Judge