

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27013

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

TRACY T. IBARA, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 04-1-0023(2) (Cr. No. 97-0336(2)))

SUMMARY DISPOSITION ORDER

(By: Lim, Presiding Judge, Foley and Fujise, JJ.)

Petitioner-Appellant pro se Tracy T. Ibara (Ibara) appeals from the Findings of Fact, Conclusions of Law, and Judgment Denying Rule 40 Petition for Post-Conviction Relief filed on February 2, 2005 in the Circuit Court of the Second Circuit^{1/} (circuit court). Ibara filed his petition for post-conviction relief (Rule 40 Petition) on October 21, 2004 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, a jury found Ibara guilty of one count each of Promoting a Dangerous Drug in the Second Degree (Promoting Second), Promoting a Dangerous Drug in the Third Degree (Promoting Third), and Promoting a Detrimental Drug in the Third Degree (Promoting Detrimental Drug), and two counts of Prohibited Acts Related to Drug Paraphernalia (Drug Paraphernalia). The circuit court sentenced Ibara to an extended term of twenty years of imprisonment for Promoting Second,

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

extended terms of ten years for each of the Promoting Third and Drug Paraphernalia charges, and thirty days of imprisonment for Promoting Detrimental Drug. The Judgment was entered on February 11, 1998.

Ibara filed an appeal on April 9, 1998. On June 4, 1999, this court issued a Summary Disposition Order in which it affirmed:

(1) the April 15, 1998 Findings of Fact, Conclusions of Law, and Order (the circuit court granted Ibara's motion to suppress evidence as to search warrant SW 97-87, but denied the motion as to all evidence recovered pursuant to the seizure of the truck and subsequent execution of search warrant SW 97-91);

(2) the April 14, 1998 Order Denying Defendant's Renewed Motion to Dismiss Indictment; and

(3) the Judgment.

The Notice and Judgment on Appeal was filed on September 28, 1999.

On October 21, 2004, Ibara filed the Rule 40 Petition, in which he alleged:

(1) His conviction resulted from ineffective assistance of counsel because his counsel failed to object at sentencing to the extended term sentences and failed to raise this claim on appeal;

(2) the circuit court imposed a sentence that violated his Sixth Amendment right to have a jury determine all facts relating to his sentence;

(3) in sentencing him to twenty years of imprisonment with a ten-year mandatory minimum for a class B felony (Promoting Second), the circuit court imposed a sentence that violated his Eighth Amendment right against cruel and unusual punishment;

(4) the circuit court imposed extended term sentences that violated his due process right under the Fourteenth Amendment;

(5) the circuit court abused its discretion when it imposed his sentence;

(6) his sentence was imposed in severe disparity;

(7) the circuit court failed to follow the "rule" under State v. Kamae, 56 Haw. 628, 548 P.2d 632 (1976), and State v. Huelsman, 60 Haw. 71, 588 P.2d 294 (1978), reh'g denied, 60 Haw. 308 (1979), when it imposed the extended terms of imprisonment; and

(8) He was not given notice on the record as to the imposition of extended term sentences.

On February 2, 2005, the circuit court, without holding a hearing, issued its findings of fact and conclusions of law and denied the Rule 40 Petition. Ibara then moved the circuit court on February 10, 2005 for leave to amend his Rule 40 petition to clarify his position on the grounds he previously presented. On February 16, 2005, Ibara filed a notice of appeal. On March 11, 2005, the circuit court denied his motion as moot.

On appeal, Ibara contends:

(1) the circuit court erred in denying his motion to amend the Rule 40 Petition because he would have utilized the amendment to further explain how his appellate, not trial, counsel^{2/} was ineffective;

(2) the circuit court erred by denying his Rule 40 Petition without a hearing;

(3) the circuit court erred in denying the Rule 40 Petition because his conviction was the result of ineffective assistance of his trial/appellate counsel; and

(4) the circuit court violated his constitutional rights by imposing extended terms of imprisonment without the assistance of a jury.

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 Ibara's Rule 40 Petition as Ibara's claims were "previously ruled upon or were waived." HRPP Rule 40(a)(3). Additionally, Ibara'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); see State v. Gomes, 107 Hawai'i 308, 113 P.3d 184, reconsideration denied, 107 Hawai'i 468, 115 P.3d 148 (2005).

^{2/} Defendant-Appellant Tracy T. Ibara's counsel at trial and on appeal was the same person.

Therefore,

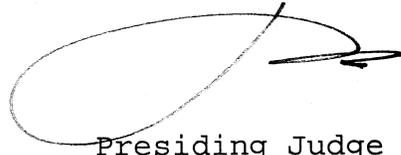
The Findings of Fact, Conclusions of Law, and Judgment Denying Rule 40 Petition for Post-Conviction Relief filed on February 2, 2005 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 29, 2006.

On the briefs:

Tracy T. Ibara,
Petitioner-Appellant pro se.

Peter A. Hanano,
Deputy Prosecuting Attorney,
County of Maui,
for Respondent-Appellee.



Presiding Judge



Associate Judge



Associate Judge