

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27021

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIICHAD EVERETT VANSTORY, aka "VIKING," Petitioner-Appellant,
v. STATE OF HAWAII, Respondent-AppelleeK. HAMAKAOU
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 04-1-0011(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 Order Regarding Defendant's Payment of Restitution (Restitution Order) filed December 3, 2004 in the Circuit Court of the Second Circuit^{1/} (circuit court).

A. Background.

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

^{1/} The Honorable Joel E. August presided.

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 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.

B. Direct Appeal.

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 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 pay restitution of \$19,258.00. Judgment was filed on June 13, 2000.

C. Petition for Post-Conviction Relief.

On April 30, 2004, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40, Vanstory filed his Petition for Post-Conviction Relief (Rule 40 Petition) in 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 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, 626, 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. In his Amended Opening Brief, 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 a 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.

On September 18, 2006, this court affirmed the circuit court's August 26, 2004 Order Dismissing Rule 40 Petition.

D. Motion to Correct Illegal Sentence.

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 that 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.

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 13, 2004, Vanstory filed a Motion for Appointment of Counsel.

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 October 20, 2004 resentencing hearing, the circuit court, on December 3, 2004, entered the free-standing Restitution Order, in which it 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 October 20, 2004, the circuit court filed its Order Denying Petitioner's Motion for Appointment of Counsel. The circuit court concluded that Vanstory's motion that counsel be appointed was not necessary for addressing the issues since the court had found Vanstory's Motion to Correct Illegal Sentence meritorious and granted the motion; held a hearing on the motion; and determined, as set by law, the amount and manner of payment of restitution.

On December 9, 2004, Vanstory filed a notice of appeal from the Restitution Order. He failed, however, to request a copy of the transcript of the October 20, 2004 resentencing hearing pursuant to Hawai'i Rules of Appellate Procedure Rule 10(b), and no copy of that transcript is before this court.

In his opening brief, Vanstory contended his rights to due process, equal protection of the law, and right to representation were violated. Vanstory argued that the circuit court

(1) erred in its Finding of Fact 2 when it failed to substantiate and verify how he was able to hire private counsel in the underlying criminal cases;

(2) erred in its Finding of Fact 3 when it failed to substantiate and verify how he was able to sell his motorcycle and various tools to pay for his private attorney;

(3) erred in its Finding of Fact 7 when it allowed the State to introduce the \$180.00 which Vanstory had received from his family in December 2003 and which was not part of his annual earnings;

(4) erred in its Finding of Fact 10 when it determined that he had the ability to pay restitution of \$19,258.00;

(5) erred in its Finding of Fact 11 when it set the manner of payment of the restitution at a rate of ten percent of his net monthly earnings;

(6) erred in its Finding of Fact 12 when it set the manner of payment of the restitution, based on inaccurate findings applied to a future sentence, at a rate of thirty percent while Vanstory was on work furlough;

(7) erred when it ordered Vanstory to pay \$19,258.00 in restitution to a judgment and sentence for the Robbery in the First Degree charge, which had been vacated; and

(8) erred when it failed to appoint counsel for Vanstory on the Motion to Correct Illegal Sentence.^{2/}

Upon careful review of the record before us and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude that Vanstory's claims are without merit. Vanstory's failure to provide a transcript of the circuit court restitution hearing precludes this court from determining whether Vanstory's claims have any merit. State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000).

Therefore,


The Findings of Fact, Conclusions of Law, and Order Regarding Defendant's Payment of Restitution filed on December 3, 2004 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, September 20, 2006.

On the briefs:

Chad Everett Vanstory,
Petitioner-Appellant pro se.

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


Chief Judge


Associate Judge


Associate Judge

^{2/} On September 13, 2004, Vanstory requested appointed counsel for his Motion to Correct Illegal Sentence Pertaining to the Restitution Order. The Motion to Correct Illegal Sentence was granted on September 27, 2004. Vanstory, in his reply brief, states that he again requested appointed counsel at his restitution hearing on October 20, 2004. However, Vanstory does not provide a transcript of that hearing to verify this statement.