

NO. 27040

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

RUSSELL M. WINTERBORNE, Petitioner-Appellant, v.  
STATE OF HAWAI'I, Respondent-Appellee

EMRIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
(S.P.P. NO. 04-1-0058 (FC-CR. NO. 94-0004))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Russell M. Winterborne

(Winterborne) appeals from the Findings of Fact, Conclusions of Law and Order Denying Petition for Post-Conviction Relief filed on December 3, 2004 in the Family Court of the First Circuit<sup>1/</sup> (family court). Winterborne filed his Petition for Post-Conviction Relief (Rule 40 Petition) on June 24, 2004 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

On March 15, 1994, Winterborne was indicted on one count of Sexual Assault in the First Degree (Count III) and four counts of Sexual Assault in the Third Degree (Counts I, II, IV and V). Pursuant to a plea agreement, Winterborne pled guilty to Counts I, III, and IV on December 19, 1994. As part of the agreement, the State reduced Count III from a class A to a class B felony (Sexual Assault in the Second Degree) and dismissed

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<sup>1/</sup> The Honorable Michael A. Town presided.

Counts II and V. Winterborne agreed to be sentenced to two five-year terms and one ten-year term of imprisonment, to be served concurrently, and the State agreed not to seek an enhanced sentence.

Prior to accepting his guilty pleas, the family court examined Winterborne and found that he knowingly, intelligently, and voluntarily entered his pleas. The family court bound itself to the terms of the plea agreement and sentenced Winterborne in accordance with the agreement. The Amended Judgment was filed on August 23, 1996. Winterborne did not appeal from the Amended Judgment.

On June 12, 2001, Winterborne, pro se, filed his first Rule 40 petition (First Petition), which the circuit court dismissed on January 4, 2002 without a hearing. The dismissal was affirmed on appeal by this court in Winterborne v. State, 104 Hawai'i 311, 88 P.3d 683 (App. 2004). Winterborne filed an application for a writ of certiorari to the Hawai'i Supreme Court, and the supreme court entered its order denying the application on May 10, 2004 (Winterborne, 104 Hawai'i 340, 89 P.3d 840 (2004)).

On June 24, 2004, Winterborne filed his Rule 40 Petition and a separate Memorandum in Support of Petition. The Rule 40 Petition alleged: (1) his judgment and sentence for Sexual Assault in the Second Degree was illegal based upon the

holding in State v. Mueller, 102 Hawai'i 391, 76 P.3d 943 (2003); (2) his sentence was illegal because he had not been given credit for time served while released prior to incarceration, which was in violation of the Double Jeopardy Clause; and (3) he was deprived of his right to effective assistance of counsel in the family court and in his first HRPP Rule 40 proceeding. The State filed its answer on September 28, 2004.

On December 3, 2004, the circuit court denied the Rule 40 Petition, and Winterborne appealed.

On appeal, Winterborne raises two points of contention: "Whether State v. Mueller, 102 Haw. 391, 76 P.3d 943 (2003), is the controlling authority in this case" and "Whether or not [Winterborne's] Guilty Plea was made 'Knowingly' and 'Voluntarily.'"

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 resolve Winterborne's points of error as follows:

(1) Winterborne waived his State v. Mueller issue, whether sexual penetration actually occurred, when he entered his plea of guilty. State v. Morin, 71 Haw. 159, 162, 785 P.2d 1316, 1318 (1990).

(2) Winterborne waived the issue of whether he entered his guilty plea knowingly and voluntarily by not having raised

this issue in his First Petition and appeal of its denial. HRPP 40(a)(3). Furthermore, this issue was not properly raised in his Rule 40 Petition and preserved in the family court. Pele Defense Fund v. Paty, 73 Haw. 578, 613, 837 P.2d 1247, 1268 (1992), cert. denied, 507 U.S. 918, 113 S. Ct. 1277 (1993); Hawai'i Rules of Appellate Procedure Rule 28(b)(4).

Therefore,

The Findings of Fact, Conclusions of Law and Order Denying Petition for Post-Conviction Relief filed on December 3, 2004 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 24, 2006.

On the briefs:

Russell M. Winterborne,  
Petitioner-Appellant pro se.

Daniel H. Shimizu,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Respondent-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge