

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27093

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

ROY RITA, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2006 JUL 27 AM 10:09

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(S.P.P. NO. 04-1-0009)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Roy Rita (Rita) appeals from the Findings of Fact; Conclusions of Law; Order Denying Petitioner's Petition for Post-Conviction Relief filed on December 10, 2004 in the Circuit Court of the Fifth Circuit^{1/} (circuit court). Rita filed his Petition to Vacate, Set Aside; or Correct Judgment or to Release Petitioner from Custody (Rule 40 Petition) on September 17, 2004 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, Rita was charged with one count of Continuous Sexual Assault of a Minor Under the Age of Fourteen Years, in violation of Hawaii Revised Statutes (HRS) § 707-733.5 (Supp. 2005), and, in the alternative, nine counts of Attempted Sexual Assault in the First Degree, in violation of HRS §§ 705-500 (1993) and 707-730(1)(b) (1993). Prior to trial, the

^{1/} The Honorable Clifford L. Nakea presided.

circuit court, on the State's motion, dismissed six of the nine attempted sexual assault charges.

Rita testified at trial. The jury found Rita guilty of the continuous sexual assault charge and, instead of three counts of Attempted Sexual Assault in the First Degree, found him guilty of three counts of the included offense of Sexual Assault in the Third Degree. The circuit court, sua sponte, stated that pursuant to HRS § 707-733.5, it could not find Rita guilty of the continuous sexual assault charge and any other felony sex offense involving the same minor and dismissed the three counts of Sexual Assault in the Third Degree. The circuit court sentenced Rita to twenty years of imprisonment on the continuous sexual assault charge.

Rita appealed. In his opening brief, Rita, represented by new counsel, argued that: (1) there was insufficient evidence to convict him of the continuous sexual assault charge; (2) the term "sexual contact" as defined by HRS § 707-700 (1993) was unconstitutionally vague, and the circuit court erred by instructing the jury as to the definition of "sexual contact"; (3) the circuit court erred in failing to instruct the jury as to the elements of Sexual Assault in the Fourth Degree, inasmuch as it is an included offense of Sexual Assault in the Third Degree; (4) his trial counsel rendered constitutionally ineffective

assistance; and (5) his conviction ran afoul of State v. Rabago, 103 Hawai'i 236, 81 P.3d 1151 (2003).

On April 29, 2004, the Hawai'i Supreme Court affirmed Rita's conviction by Summary Disposition Order. The court concluded Rita had not shown that his trial counsel provided ineffective assistance because Rita "failed to satisfy his burden of demonstrating that 'specific errors or omissions resulted in the withdrawal or substantial impairment of a meritorious defense,' State v. Poaipuni, 98 Hawai'i 387, 392, 49 P.3d 353, 358 (2002)."

On September 27, 2004, Rita filed his Rule 40 Petition, in which he alleged that his conviction should be vacated because his trial and appellate counsel were ineffective on five grounds: (1) his trial counsel had not investigated the charges, specifically that Rita had sold the PlayStation (which the State had brought into evidence and to which the minor had referred) weeks prior to the date of the first alleged sexual assault; (2) his trial and appellate counsel had failed to argue inconsistencies between the indictment and continuous sexual assault statute regarding the minor's age; (3) his trial and appellate counsel had "failed to present the evidence that would prove [his] innocence," thereby violating his Hawai'i and federal constitutional rights; (4) his appellate counsel had failed to argue federal constitutional issues, hindering Rita's ability to

bring his argument before the federal appellate courts; and (5) his trial counsel had failed to raise the issue of the minor's alleged perjury when she testified during trial that Rita had the PlayStation at the time of the alleged sexual assault, when Rita had sold the PlayStation several weeks prior to the time in question. Rita did not offer any argument beyond setting forth these five allegations in his Rule 40 Petition.

On December 10, 2004, the circuit court filed its Findings of Fact; Conclusions of Law; Order Denying Petitioner's Petition for Post-Conviction Relief, in which the court concluded that Rita's claims of ineffective assistance of counsel were "patently frivolous, and [were] without a trace of support either in the record, or from other evidence submitted by [Rita]."

On appeal, Rita contends his trial counsel was ineffective for failing to investigate the minor's false allegation regarding the PlayStation.^{2/} He contends his appellate counsel was ineffective for (1) not contacting Rita prior to preparation of the opening brief to obtain Rita's input on the issues that should have been raised in the brief and,

^{2/} At trial, Petitioner-Appellant Roy Rita (Rita) testified that, during the period of the alleged continuous sexual assault, the PlayStation was broken and also testified that it was working at least some of the time. Rita did not testify that the PlayStation had been sold prior to the period of the alleged continuous sexual assault.

instead, relying only on the facts in the trial transcripts^{3/}; (2) failing to address the issue of the "facts concerning the innocence" of Rita; (3) failing to address the fact that his conviction was unconstitutional pursuant to State v. Rabago, supra; (4) failing to introduce newly discovered exculpatory evidence that Rita did not have possession of the PlayStation during the period in question; and (5) failing to argue constitutional issues, which hindered Rita's ability to bring his argument before the federal appellate courts.

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:

1. Rita's claims that his trial counsel was ineffective were "previously ruled upon or were waived." Hawaii Rules of Penal Procedure Rule 40(a)(3).
2. Rita has failed to show that his appellate counsel was ineffective.

When reviewing a claim of ineffective assistance of counsel, this court looks at whether defense counsel's assistance was within the range of competence demanded of attorneys in criminal cases. The defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of

^{3/} In the Statement of Facts section of his opening brief, Rita states that "[a]t trial and during appeal, [Rita] argued with trial counsel, as well [sic] appellate counsel, that the 'play station' had not been in the house of [Rita] during the time in question, as it had been sold prior to the time of alleged assault." (Emphasis added.)

skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. To satisfy this second prong, the defendant needs to show a possible impairment, rather than a probable impairment, of a potentially meritorious defense. A defendant need not prove actual prejudice.

State v. Wakisaka, 102 Hawai'i 504, 513-14, 78 P.3d 317, 326-27 (2003) (internal quotation marks, citations, and footnote omitted).

Therefore,

The Findings of Fact; Conclusions of Law; Order Denying Petitioner's Petition for Post-Conviction Relief filed on December 10, 2004 in the Circuit Court of the Fifth Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 27, 2006.

On the briefs:

Roy Rita,
Petitioner-Appellant pro se.

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kaua'i,
for Respondent-Appellee.



Presiding Judge



Associate Judge



Associate Judge