

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NOS. 27140 & 27241

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JONATHAN IBANA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CR. NOS. 01-1-0200 and 01-1-0250)

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

2006 NOV 30 AM 8:44

FILED

SUMMARY DISPOSITION ORDER

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

In these consolidated appeals (No. 27140/Cr. No. 01-1-0200 & No. 27241/Cr. No. 01-1-0250), Jonathan Kalani Ibana (Defendant) appeals the January 28, 2005 order that the Circuit Court of the Fifth Circuit (circuit court)¹ entered in both criminal cases. The order dismissed, without a hearing, Defendant's post-judgment motion, filed in both cases on January 28, 2005,² partially entitled "Defendant's Reconsideration of Sentence Motion Pursuant to [Hawai'i Rules of Penal Procedure (HRPP)] Rule 35 [(2005)]" (the Rule 35 Motion).

After a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we conclude that the circuit court was right to deny Defendant's Rule 35 Motion without a hearing, Barnett v. State, 91 Hawai'i

¹ The Honorable George M. Masuoka presided.

² Mailed from the Tallahatchie Community Correctional Center in Tutwiler, Mississippi on December 15, 2004.

20, 26, 979 P.2d 1046, 1052 (1999), because

(1) Defendant failed to "allege[] facts that if proven would entitle [Defendant] to relief," HRPP Rule 40(f) (2005);

(2) Defendant's Rule 35 Motion was "patently frivolous and . . . without trace of support either in the record or from other evidence submitted by [Defendant,]" HRPP Rule 40(f);

(3) "the issues sought to be raised have been previously ruled upon" in the proceedings (SPP No. 03-1-0003) on Defendant's June 18, 2003 HRPP Rule 40 petition (the Rule 40 Petition), HRPP Rule 40(a)(3) (2005);

(4) Defendant waived the issues he sought to raise in his Rule 35 Motion because he "failed to raise [them] and [they] could have been raised[,]" HRPP Rule 40(a)(3), in direct appeals of the original July 25, 2002 judgments, which were not taken, or in the Rule 40 Petition, or in a direct appeal of the circuit court's December 12, 2003 order denying the Rule 40 Petition, which was not taken, and Defendant has not "prove[d] the existence of extraordinary circumstances to justify [his] failure to raise the issue[s]" to rebut the "presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure[,]" HRPP Rule 40(a)(3); and/or

(5) Defendant's Rule 35 Motion, which sought a

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reduction of his sentences, was not filed "within 90 days after the sentence[s were] imposed," and was therefore untimely, HRPP Rule 35(b).

Therefore, by reason of any or all or any combination of the foregoing,

IT IS HEREBY ORDERED that the January 28, 2005 order that the circuit court entered in Cr. No. 01-1-0200 and Cr. No. 01-1-0250 is affirmed.

DATED: Honolulu, Hawai'i, November 30, 2006.

On the briefs:

Jonathan Ibane,
Defendant-Appellant,
pro se.

Lisa M. Itomura and
Diane Taira,
Deputy Attorneys General,
State of Hawai'i,
for Plaintiff-Appellee.



Presiding Judge

Craig W. Nakamura
Associate Judge

Alice R. O'Neil
Associate Judge