

NO. 27227

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

BRIAN G. JESS, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

EMILIANO
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STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 04-1-0045 (Cr. No. 00-1-0422))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Brian G. Jess (Jess) appeals from the "Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, Filed May 19, 2004, Without a Hearing" filed on March 29, 2005 in the Circuit Court of the First Circuit^{1/} (circuit court). Jess filed his "Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" on May 19, 2004 and his Amended Rule 40 Petition on July 16, 2004 (collectively, Rule 40 Petition), pursuant to Hawaii Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, a jury convicted Jess of Count I, Robbery in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 708-840(1)(b)(ii) (1993 & Supp. 2005),

^{1/} The Honorable Virginia Lea Crandall presided.

and Count II, Unauthorized Control of Propelled Vehicle, in violation of HRS § 708-836 (1993 & Supp. 2000). The trial court sentenced Jess to an extended term of life imprisonment with a mandatory minimum of six years and eight months as to Count I and an extended term of ten years of imprisonment with a mandatory minimum of one year and eight months as to Count II, both sentences to run concurrently.

Jess appealed his conviction. In appeal No. 24339,^{2/} he asserted:

(1) The trial court abused its discretion in denying his motion to suppress evidence of two witnesses' identification of Jess as the perpetrator of the crimes because under the totality of the circumstances the pretrial identifications were not reliable;

(2) The trial court committed reversible error by allowing the State to tell the jury that the court, instead of the jury, had the "last word" on the propriety of the Honolulu Police Department's identification procedure; and

(3) Hawai'i's extended term sentencing statute, HRS § 706-662 (Supp. 2000), was unconstitutional in light of the United State Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), because it allowed the trial court to impose a sentence greater than the statutory

^{2/} This court takes judicial notice of the records and files in appeal No. 24339, State v. Jess.

maximum sentence based on findings of fact that were not submitted to the jury.

On September 26, 2003, the Hawai'i Supreme Court issued a Summary Disposition Order in which it affirmed Jess's conviction and sentence.

In his Rule 40 Petition, Jess alleged the following grounds:

(A) The circuit court erred in denying his Motion to Suppress Identification.

(B) The circuit court erred in admitting testimony of witnesses David Duong (Duong) and Canh Tran (Tran) obtained during a police interrogation, which occurred without the use of an interpreter.

(C) The circuit court erred in admitting a photograph of a butcher knife, when the knife did not belong to Jess and had not been used in the robbery.

(D) The deputy prosecuting attorney misstated the law during the direct examination of Officer Everett and again during the rebuttal argument when the deputy prosecuting attorney stated that any improper identification would be decided by the court not the police, and, although defense counsel objected, the trial court took no curative measures to address this issue.

(E) The circuit court erred in failing to issue a jury instruction that would have cured the deputy prosecuting attorney's misconduct as to the improper identification statement

and in failing to rule on Jess's third objection to the misconduct.

(F) Jess received ineffective assistance of counsel from his trial counsel, who failed (1) to object to the deputy prosecuting attorney's initial misstatement of the law during Officer Everett's testimony, (2) to request a line-up prior to the in-court identification by State witnesses Duong and Tran, (3) to apprise Jess of the possible penalties he faced at sentencing, and (4) to object to numerous inaccuracies in Jess's Presentence Investigation Report (PSIR) and the use of the PSIR; who stipulated to Jess's criminal record at sentencing without any investigation into the accuracy of the record; and who, at sentencing, told Jess that if Jess addressed the trial court regarding mitigating circumstances as to Jess's performance while he was on probation, then Jess was on his own -- implying that counsel would no longer represent Jess.

(G) At Jess's sentencing, the State engaged in prosecutorial misconduct by reading into the record a detailed description of Jess's past crimes, not informing the trial court that several of the convictions had been dismissed, and misrepresenting a 1986 conviction as being against an elderly Japanese female. Jess also argues that the inclusion in the PSIR of several arrests that did not result in charges being filed or convictions obtained and of several convictions that resulted in imprisonment absent a showing that Jess was represented by

counsel or had made an intelligent waiver of counsel was prejudicial to him and resulted in a more severe sentence.

(H) Jess received ineffective assistance of counsel from his appellate counsel because appellate counsel failed to (1) raise ineffectiveness of trial counsel despite Jess's instruction to do so, (2) adequately brief and argue the two issues raised on appeal, (3) keep in contact with Jess, (4) provide Jess with any information regarding his appeal, and (5) timely provide Jess with the decision of the Hawai'i Supreme Court on his appeal.

(I) The use of the PSIR at Jess's sentencing hearing was unconstitutional since Jess's request to have his attorney present at the PSIR interview was wrongly denied. Jess advised the probation officer that he wanted counsel at the interview, but the probation officer informed Jess that the officer was unable to return at a later date and Jess had to give the interview or no report would be provided. Jess submitted to the interview. Jess alleges that he was coerced into giving the interview since he was in custody at the time.

(J) Jess's term of life imprisonment with the possibility of parole was unconstitutional under Apprendi and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004).

The State filed its answers to Jess's original and amended petitions on July 19, 2004 and August 17, 2004.

On November 1, 2004, in his reply to the State's answer, Jess withdrew ground (B) above.

The circuit court, without holding a hearing, denied Jess's Rule 40 Petition, finding that his claims had been previously ruled upon, waived, or were patently frivolous and without a trace of support in the record.

On appeal, Jess contends:

(1) He received ineffective assistance of appellate counsel because (a) instead of arguing that the State was allowed to argue that "Circuit Court had the last word on HPD's [Honolulu Police Department] identification procedure," counsel argued that the State was allowed to argue that "the Circuit Court and not the jury, had the last word on the identification of the defendant as the perpetrator" (emphasis in original); (b) counsel failed to adequately research and brief and persuasively argue the two issues that were raised or to frame the two issues as violations of the United States Constitution; (c) counsel's failure to assert additional grounds for relief (the trial court erred in admitting the photograph of the butcher knife, and the trial court failed to issue a curative instruction after the deputy prosecuting attorney told the jury that, with respect to the validity of the identifications, the court has the last word), in spite of having been specifically directed to do so by Jess, barred those claims from further consideration on

collateral review; and (d) counsel failed to keep in contact with Jess, apprise Jess in a timely manner of developments in his case, and provide Jess with his files and transcripts in a timely manner.

(2) The circuit court reversibly erred when it failed to acknowledge the trial court's error in denying Jess's motion to suppress evidence of the two witnesses' pretrial identification of Jess. The circuit court's ruling made no allowance for the underlying ineffective assistance of appellate counsel claim. If appellate counsel were found to be ineffective, then the doctrines of waiver and res judicata would not bar consideration of this issue. Jess also contends the circuit court should have held an evidentiary hearing on this issue.

(3) The circuit court reversibly erred when it failed to acknowledge the trial court's error in admitting the photograph of the kitchen knife into evidence because the knife did not belong to Jess, the knife was not used in the commission of the robbery, the knife was therefore irrelevant and unrelated to the crime, and the admission of the photograph was prejudicial to Jess.

(4) The circuit court reversibly erred when it failed to acknowledge that the deputy prosecuting attorney misstated the law regarding the responsibility for determining the propriety of

identification to the jury during the examination of Officer Everett and during rebuttal argument.

(5) The circuit court reversibly erred when it failed to acknowledge the trial court's error in failing to provide a curative instruction after the deputy prosecuting attorney told the jury that, with respect to the propriety of the identifications, "the court has the last word."

(6) Ineffective assistance of trial counsel when, at sentencing, counsel failed to object to and stipulated to numerous inaccuracies in Jess's criminal record; failed to object to the deputy prosecuting attorney's characterization of one offense as a "purse-snatching," ignoring Jess's objection that there was no purse-snatching; failed to object to the use of the PSIR, ignoring Jess's concerns that the PSIR was hearsay, substantially inaccurate, and obtained from Jess without benefit of counsel; and failed to advise Jess of the maximum amount of sentence Jess could receive. Jess also alleges that when he told his trial counsel that he wanted to address the court at sentencing, trial counsel stated, "You do that, and you are on your own!"; Jess understood this to mean that counsel would withdraw and refuse to represent Jess during any future proceedings.

(7) The circuit court reversibly erred by failing to acknowledge the trial court's error during sentencing when the

trial court allowed the deputy prosecuting attorney to mischaracterize Jess's arrest for Theft in the First Degree as "purse-snatching" from an elderly Japanese female, when the victim was not elderly, female, or Japanese and there was no purse-snatching involved. Jess also argues that the inclusion in the PSIR of several arrests that did not result in charges being filed or convictions obtained and of several convictions that resulted in imprisonment, absent a showing that Jess had been represented by counsel or had made an intelligent waiver of counsel, was prejudicial to him and resulted in a more severe sentence.

(8) The circuit court reversibly erred when it failed to acknowledge the trial court's error in using the PSIR because during the interview for the PSIR, Jess told his probation officer that he wanted his attorney present during the interview, but the probation officer refused Jess's request. Jess argues that this procedure for preparing the PSIR violated his constitutional right not to incriminate himself.

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 Jess's Rule 40 Petition, as Jess's claims were "previously ruled upon or were waived" (HRPP Rule 40(a)(3)) and "patently frivolous and . . . without trace of support either in the record or from other evidence submitted by the petitioner" (HRPP Rule 40(f)).

Therefore,

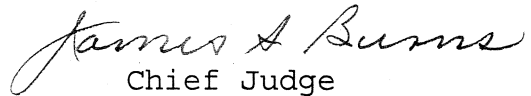
The "Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, Filed May 19, 2004, Without a Hearing" filed on March 29, 2005 in the Circuit Court of the First Circuit is affirmed.

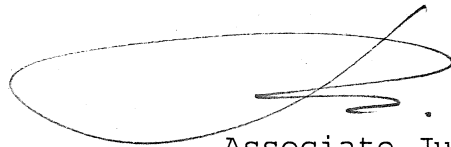
DATED: Honolulu, Hawai'i, September 29, 2006.

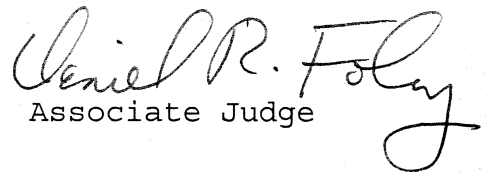
On the briefs:

Brian G. Jess,
Petitioner-Appellant pro se.

Sonja P. McCullen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent-Appellee.


Chief Judge


Associate Judge


Associate Judge