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NO. 27342

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

NORMA T. YARA
CLERK, APPELLATE COURT
STATE OF HAWAII
2006 NOV 28 AM 10: 22
FILED

MELVIN DE. FREITAS, JR., Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 04-1-0096)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Watanabe and Lim, JJ.)

Melvin De. Freitas, Jr. (Defendant) appeals the May 13, 2005 decision and order of the Circuit Court of the First Circuit (circuit court)[1] that dismissed, without a hearing, his December 1, 2004 Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2004) petition for post-conviction relief (Rule 40 Petition).

In his Rule 40 Petition, Defendant attacked the June 14, 2000 judgment that amended the original August 18, 1997 judgment, pursuant to the remand from his direct appeal of the 1997 judgment. See State v. Freitas, No. 20954 (Haw. App. filed October 26, 1998) (mem.) (notice and judgment on appeal filed January 3, 2000). The resulting judgment convicted Defendant, upon a jury's verdicts, of three counts of kidnapping and a single count each of robbery in the second degree, terroristic threatening in the first degree and assault in the third degree, and sentenced him to an extended term of imprisonment for each of the felony convictions.

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[1] The Honorable Richard K. Perkins presided.

Of the ten grounds for relief from his convictions and sentences Defendant asserted in support of his Rule 40 Petition, only one is argued on appeal: That the trial court contravened the dictates of Apprendi v. New Jersey, 530 U.S. 466 (2000), in sentencing him to extended terms of imprisonment as a "persistent offender" under HRS § 706-662(1) (Supp. 2005), and as a "multiple offender" under HRS §§ 706-662(4)(a) and -662(4)(b) (Supp. 2005).

However,

> [Defendant] was sentenced and his direct appeal became final . . . before the announcement of the Supreme Court's rule in Apprendi. Therefore, by any construction of Apprendi, [Defendant's] sentence could not have been illegal at the time the circuit court imposed it. Hence, there was no merit to [Defendant's] subsequent HRPP Rule [40] claim based on Apprendi, Apprendi not having established a new rule of criminal procedure that fits within one of [the Teague v. Lane, 489 U.S. 288 (1989),] exceptions. That being the case, we hold that the Apprendi rule, however it may be construed, is not controlling retroactively on collateral attack.

State v. Gomes, 107 Hawai'i 308, 314, 113 P.3d 184, 190 (2005).

Even assuming, *arguendo*, that the Gomes preemption does not apply, Defendant waived his Apprendi argument because he "knowingly and understandably failed to raise it and it could have been raised[,]" HRPP Rule 40(a)(3),[2] in a direct appeal of

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[2] Compare Hawai'i Rules of Penal Procedure (HRPP) Rule 40(a)(3) (2004):

> Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. Except for a claim of illegal sentence, an issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

the June 14, 2000 judgment, which was not taken, or in Defendant's previous HRPP Rule 40 petition (SPP No. 02-1-0028), which was filed on April 11, 2002. Moreover, Defendant has not even attempted "to prove the existence of extraordinary circumstances to justify [his] failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure." HRPP Rule 40(a)(3).

Even assuming, further *arguendo*, that neither the Gomes preemption nor the HRPP Rule 40(a)(3) waiver provision applies, it remains well established that Defendant's Apprendi argument cannot advance. State v. White, 110 Hawai'i 79, 90, 129 P.3d 1107, 1118 (2006); State v. Maugaotega, 107 Hawai'i 399, 410, 114

(Emphasis supplied.) with HRPP Rule 35 (2004):

> **(a) Correction of Illegal Sentence.** The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. A motion made by a defendant to correct an illegal sentence more than 90 days after the sentence is imposed shall be made pursuant to Rule 40 of these rules. A motion to correct a sentence that is made within the 90 day time period shall empower the court to act on such motion even though the time period has expired.
>
> **(b) Reduction of Sentence.** The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding the judgment of conviction. A motion to reduce a sentence that is made within the time prior shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

(Emphases supplied.)

P.3d 905, 916 (2005); State v. Rivera, 106 Hawai'i 146, 161, 102 P.3d 1044, 1059 (2004); State v. Hauge, 103 Hawai'i 38, 60, 79 P.3d 131, 153 (2003); State v. Kaua, 102 Hawai'i 1, 13, 72 P.3d 473, 485 (2003).

Under any one or any combination of the foregoing, Defendant's Rule 40 Petition was "patently frivolous and . . . without trace of support either in the record or from other evidence submitted by [Defendant,]" HRPP Rule 40(f), and thus the circuit court was right to deny the Rule 40 Petition without a hearing. Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999).

Therefore, after a meticulous 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,

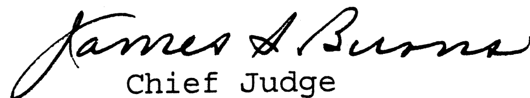
IT IS HEREBY ORDERED that the circuit court's May 13, 2005 decision and order is affirmed.

DATED: Honolulu, Hawai'i, November 28, 2006.

On the briefs:

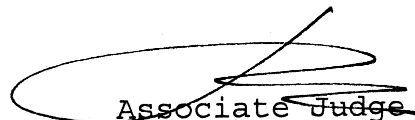
Melvin De. Freitas, Jr.,
Petitioner-Appellant,
pro se.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent-Appellee.



Chief Judge

Associate Judge



Associate Judge