

NO. 27372

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

SIMI TUPUOLA, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

EMILIANO
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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 05-1-0004 (Cr. No. 99-1990))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Simi Tupuola (Tupuola) appeals from the "Findings of Fact, Conclusions of Law, and Order Denying Motion for Correction of Illegal Sentence Pursuant to Rule 40, Filed January 13, 2005, Without a Hearing" filed on May 26, 2005 in the Circuit Court of the First Circuit^{1/} (circuit court). Tupuola filed his "Motion for Correction of Illegal Sentence Pursuant to Rule 40 of the Hawaii Rules of Penal Procedure" (Rule 40 Motion) on January 13, 2005 pursuant to Hawaii Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, a jury found Tupuola guilty of Robbery in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 708-841(1)(a) (1993). The State moved to sentence Tupuola to an extended term of imprisonment as a persistent offender pursuant to HRS §§ 706-661 (Supp. 2005) and 706-662(1) (Supp. 2005). The circuit court granted the motion, finding that (1) Tupuola was a persistent offender and an

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

extended term of imprisonment was necessary for the protection of the public; (2) on or about February 27, 1995, Tupuola had been convicted in the circuit court in Cr. Nos. 94-0303, 94-0385, and 94-0538 of felony charges of Unauthorized Control of Propelled Vehicle and Attempted Unauthorized Control of Propelled Vehicle; and (3) Tupuola was eighteen years of age or older when he was convicted of these three felony charges. The circuit court sentenced Tupuola to an extended term of imprisonment of twenty years with a mandatory minimum term of ten years.

On June 16, 2000, Tupuola appealed his conviction, arguing that the circuit court erred in denying his motion to suppress. On March 16, 2001, in No. 23532, the Hawai'i Supreme Court summarily affirmed Tupuola's conviction and sentence.

On July 30, 2001, Tupuola moved the circuit court for correction of an illegal sentence pursuant to HRPP Rule 35 (Rule 35 Motion). Tupuola argued that the circuit court had erred in finding he was a persistent offender because:

(1) the circuit court had not found that Tupuola had committed two felonies at different times when he was eighteen years or age or older,

(2) the State had not pled the criteria for enhanced sentencing in the State's indictment against him, and

(3) the circuit court had failed to utilize a jury to make factual findings in support of a mandatory minimum term of imprisonment.

On August 29, 2001, the circuit court denied, without a hearing, Tupuola's Rule 35 Motion.

In his January 13, 2005 Rule 40 Motion, Tupuola argued that the circuit court had erred by granting the State's motion for an extended term of imprisonment as a persistent offender pursuant to HRS § 706-662(1) because:

(1) the State failed to plead, and a jury did not find, that an extended term of imprisonment was necessary for the protection of the public, and

(2) the circuit court did not find that Tupuola had committed two felonies at different times when he was eighteen years of age or older.

On May 26, 2005, the circuit court denied, without a hearing, Tupuola's Rule 40 Motion and entered its written findings of facts and conclusions of law.

On appeal, Tupuola contends that under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), the State should have pleaded the elements for an extended term of imprisonment in the State's indictment against Tupuola; the circuit court should have utilized a jury to make the factual finding that an extended term of imprisonment was necessary for the protection of the public; and the circuit court failed to make findings of fact and conclusions of law on the record when it denied his Rule 40 Motion.

The State counters that the order denying the Rule 40 Motion was proper because Tupuola waived the legality of his

extended term of imprisonment when he failed to raise this issue on the appeal from his conviction and the circuit court followed proper procedures, as approved in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004), in sentencing Tupuola to an extended term of imprisonment.

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 Tupuola's Rule 40 Motion as the issues raised in the Rule 40 Motion were not raised in Tupuola's appeal of his conviction and sentence and therefore were waived. HRPP Rule 40(a)(3).

Therefore,

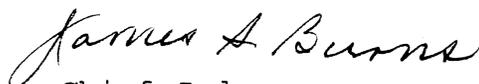
The "Findings of Fact, Conclusions of Law, and Order Denying Motion for Correction of Illegal Sentence Pursuant to Rule 40, Filed January 13, 2005, Without a Hearing" filed on May 26, 2005 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 25, 2006.

On the briefs:

Simi Tupuola,
Petitioner-Appellant pro se.

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent-Appellee.


Chief Judge


Associate Judge


Associate Judge