

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27623

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

TRACY T. IBARA, Petitioner-Appellant, v.
STATE OF HAWAI'I, Plaintiff-Appellee

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

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 05-1-0026(2) (Cr. No. 97-0336(2)))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant pro se Tracy T. Ibara (Ibara) appeals from the October 19, 2005 order^{1/} dismissing his Petition for Post-Conviction Relief filed in the Circuit Court of the Second Circuit^{2/} (circuit court). Ibara filed his Petition for Post-Conviction Relief (Rule 40 Petition) on September 19, 2005 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, a jury found Ibara guilty of one count each of Promoting a Dangerous Drug in the Second Degree (Promoting Second), Promoting a Dangerous Drug in the Third Degree (Promoting Third), and Promoting a Detrimental Drug in the Third Degree (Promoting Detrimental Drug), and two

^{1/} The Circuit Court of the Second Circuit (circuit court) did not file a separate order denying Defendant-Appellant Tracy T. Ibara's Petition for Post-Conviction Relief. The circuit court merely stamped "APPROVED AND SO ORDERED" on the State's "Ex Parte Motion to Dismiss Petitioner's Petition for Post-Conviction Relief (Rule 40, HRPP) Due to Lack of Jurisdiction."

^{2/} The Honorable Shackley F. Raffetto presided.

counts of Prohibited Acts Related to Drug Paraphernalia (Drug Paraphernalia). The circuit court sentenced Ibara to an extended term of imprisonment of twenty years for Promoting Second, extended terms of imprisonment of ten years for each of the Promoting Third and Drug Paraphernalia charges, and thirty days of imprisonment for Promoting Detrimental Drug. The Judgment was entered on February 11, 1998.

Ibara filed an appeal on April 9, 1998. On June 4, 1999, this court issued a Summary Disposition Order in which it affirmed:

(1) the April 15, 1998 Findings of Fact, Conclusions of Law, and Order (the circuit court granted Ibara's motion to suppress evidence as to search warrant SW 97-87, but denied the motion as to all evidence recovered pursuant to the seizure of the truck and subsequent execution of search warrant SW 97-91);

(2) the April 14, 1998 Order Denying Defendant's Renewed Motion to Dismiss Indictment; and

(3) the Judgment.

The Notice and Judgment on Appeal was filed on September 28, 1999.

On October 21, 2004, Ibara filed a Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody in the circuit court under S.P.P. 04-1-0023(2) (2004 Petition). On February 2, 2005, the circuit court issued

Findings of Fact, Conclusions of Law, and Judgment Denying Rule 40 Petition for Post-Conviction Relief. On February 16, 2005, Ibara filed a notice of appeal from the circuit court's denial of the 2004 Petition.

On September 19, 2005, while the appeal on Ibara's 2004 Petition was pending, Ibara filed his Rule 40 Petition. On October 19, 2005, the State filed its "Ex Parte Motion to Dismiss Petitioner's Petition for Post-Conviction Relief (Rule 40, HRPP) Due to Lack of Jurisdiction," which the circuit court granted.

On appeal, Ibara contends: (1) his trial/appellate attorney was ineffective for failing to discover that search warrant SW 97-91, for the search of a truck seized on May 27, 1997, was facially expired and invalid; and (2) the circuit court erred in not recognizing, sua sponte, that search warrant SW 97-91 was facially expired and invalid under the Hawai'i Constitution as interpreted by the Intermediate Court of Appeals of the State of Hawai'i in State v. Endo, 83 Hawai'i 87, 924 P.2d 581 (App. 1996), and the circuit court erred in admitting the warrant and the fruits thereof into evidence in Cr. No. 97-0336(2).

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 Ibara's Rule 40 Petition as Ibara's claims were "previously ruled upon or were waived." HRPP Rule 40(a)(3).

Therefore,

The October 19, 2005 order dismissing his Petition for Post-Conviction Relief filed in the Circuit Court of the Second Circuit is affirmed.

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

On the briefs:

Tracy T. Ibara,
Petitioner-Appellant pro se.

Peter A. Hanano,
Deputy Prosecuting Attorney,
County of Maui,
for Respondent-Appellee.



Presiding Judge



Associate Judge



Associate Judge