

NO. 27129

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

FREEDUS W. WILTON, II, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

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STATE OF HAWAI'I

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 01-1-0006(1) (Cr. No. 97-0050))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Freedus W. Wilton II (Wilton)

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 on December 1, 2004 in the Circuit Court of the Second Circuit^{1/} (circuit court). Wilton filed his "Verified Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" (Verified Petition) on March 20, 2001 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40. On August 26, 2004, Wilton filed an "Amendment to Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" (Amended Petition) (the Verified Petition and Amended Petition are collectively referred to as "Rule 40 Petition").

^{1/} The Honorable Joel E. August presided.

In the underlying criminal case, the State indicted Wilton for the following offenses:

Count One: Burglary in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993);

Count Two: Robbery in the First Degree, in violation of HRS § 708-840(1)(a) and/or (b)(ii) (1993);

Count Three: Attempted Murder in the First Degree, in violation of §§ 705-500 (1993) and 707-701 (1993);

Count Four: Place to Keep Firearm, in violation of HRS § 134-6 (Supp. 1998);

Count Five: Carrying or Use of Firearm in the Commission of a Separate Felony, in violation of HRS § 134-6(a) (Supp. 1998); and

Count Six: Use of Deadly or Dangerous Weapon in the Commission of a Crime, in violation of HRS § 134-51(b) (1993).

Jury trial began on April 6, 1998. David A. Sereno (Sereno) represented Wilton. On April 13, 1998, the State rested its case. The circuit court questioned Wilton as to whether he understood his right to testify and Wilton informed the court he understood that (1) he had a right to testify and no one could stop him from testifying; (2) if he testified, the State was allowed to cross-examine him; (3) he had a constitutional right not to testify and to remain silent; (4) if he chose to remain silent, the jury would be instructed that it could not hold his silence against him in deciding his case; and (5) he had talked to Sereno about his decision not to testify. Wilton stated to

the circuit court that it was his decision not to testify. Sereno informed the circuit court that the defense would not be presenting any evidence. Both sides presented closing arguments to the jury. Later that same day, the jury returned a verdict of guilty on all counts.

On June 2, 1998, Sereno filed a motion to withdraw as counsel and to substitute in the Office of the Public Defender because Wilton had informed Sereno that he believed Sereno had been ineffective in his representation of him. On June 8, 1998, the circuit court granted the motion and appointed the Office of the Public Defender to represent Wilton.

On June 5, 1998, Wilton, pro se, filed a Petition for Post-Conviction Relief in S.P.P. 98-0008(1), in which he alleged ineffective assistance of counsel because Sereno (1) had not raised as a defense that Wilton had Multiple Sclerosis and was therefore unable to run away from the scene of the crime, which would have impeached the State's witnesses's testimony; (2) failed to put before the jury side-view photographs taken of Wilton at the police department that would have impeached frontal-view photographs taken of Wilton at the police station; (3) told Wilton not to testify even though Wilton wanted to testify so he could tell the jury he had Multiple Sclerosis; (4) failed to call any witnesses and specifically Frank Krau as a witness; and (5) failed to provide exculpatory evidence that the

gun and hat found at the victims' residence had been stolen from Wilton's apartment. On October 20, 1998, Wilton voluntarily withdrew the petition, without prejudice, because it was untimely.

On July 16, 1998, the Office of the Public Defender withdrew as counsel and Vickie Russell (Russell) substituted in. Russell represented Wilton at his sentencing hearing on July 29, 1998. The circuit court sentenced Wilton to the following concurrent sentences:

<u>Count(s)</u>	<u>Sentence</u>
Three:	Life imprisonment without parole
Two and Five:	Twenty years of imprisonment
One and Four:	Ten years of imprisonment
Six:	Five Years of imprisonment

The circuit court entered its Judgment on July 30, 1998. Wilton appealed from the Judgment on August 19, 1998. On July 29, 1999, in S. Ct. No. 21845, Wilton filed an Amended Stipulation to Dismiss Appeal. In his declaration attached to the stipulation, Wilton stated that he believed no issues existed upon which an appeal might be based; he knowingly and voluntarily waived his right to the appeal; he had discussed the matter with his attorney and understood the contents of the stipulation and its consequences; and he wanted this appeal dismissed so he might proceed with a petition for post-conviction relief. The Hawai'i Supreme Court approved the stipulation and dismissed the appeal.

On March 20, 2001, Russell filed on behalf of Wilton the Verified Petition, in which he alleged that he was denied effective assistance of counsel at trial because Sereno had failed to present evidence that Wilton had Multiple Sclerosis and could not therefore run, failed to allow Wilton to testify at trial,^{2/} and failed to present any evidence in Wilton's defense.

The State filed its response to the Verified Petition on April 27, 2001.

During September and October 2001, Wilton filed pro se motions to have an attorney appointed for him (Russell had given up the practice of law), to file an amended petition, and to reinstate his petition with a pro se addendum.

On May 28, 2003, the circuit court entered orders appointing the Office of the Public Defender as counsel for Wilton, and directing that office to file an amended HRPP Rule 40 petition on behalf of Wilton and ordering the State to file a response to the amended petition.

On August 26, 2004, the Office of the Public Defender filed the Amended Petition on behalf of Wilton, alleging, in addition to the claims set forth in his Verified Petition, that:

^{2/} In his petition, Wilton argued that he wanted to testify at trial so he could explain that because of his Multiple Sclerosis he could not run and that he had kept a notebook of anything he knew or any contact he had with the victims and any other information that might aid the police in their investigation at the suggestion of a private investigator, who was his friend and neighbor. The police found the notebook in Wilton's backpack when he was arrested. The State argued at trial that the notebook was inculpatory evidence, and Wilton wanted to explain why he kept the notes.

(1) Wilton's sentence was an illegal sentence because (a) under State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), which was the controlling case at the time Wilton was sentenced, Wilton should not have been convicted for both carrying or use of a firearm in a separate felony and in the underlying felony and the conviction for the included offense (the burglary charge) should have been vacated; and (b) under State v. Christian, 88 Hawai'i 407, 967 P.2d 239 (1998), Count Six, Carrying or Use of a Deadly Weapon in the Commission of a Crime, should have been vacated in favor of the greater offenses of Attempted Murder in the First Degree and Robbery in the First Degree. Wilton argued that Russell was ineffective at his sentencing because she failed to raise these issues.

(2) Russell was ineffective in perfecting the original appeal because had Wilton known when he signed his declaration agreeing to dismiss his appeal in S. Ct. No. 21845 that Russell had been sanctioned twice for missing a deadline in his appeal and was intending to close her law practice and leave Hawai'i, he would have been alerted that the problem with his appeal might not have been that there were no legal issues to be raised, but that Russell had been sanctioned and was leaving Hawai'i. Wilton claims he would not have agreed to dismiss his appeal had he known these facts at the time he signed his declaration. He argues that his waiver of the appeal was not knowing and intelligent.

The State filed its response to the Amended Petition on September 27, 2004. The circuit court held a hearing on October 15, 2004 on all of Wilton's post-conviction claims. The circuit court denied Wilton's claims against Russell and Sereno, stating as to Sereno:

THE COURT: I reviewed the issues concerning trial counsel and it does appear to the Court that whatever decisions were made were based on strategy as opposed to some failure to adequately, you know, represent the defendant on Mr. Sereno's part.

I think there may have been very good reasons why certain matters were not brought before the jury, particularly with regard to the underlying disease which the defendant was claiming had a significant effect on his ability to move. However, when one looks at the doctor's reports that certainly is not clear from the doctor's reports.

. . . .

And I've read the colloquy that went on, the Tachibana colloquy that went on between the Court and the defendant, and it's quite clear there was an adequate colloquy.

So if, in fact, the defendant wanted to indicate to the Court after being told it was his decision and not his attorney's that he wanted to testify, he certainly could have indicated that to the Court and apparently did not from what I've seen of the record.

So, the Court is inclined to deny both [petitions].

On December 1, 2004, the circuit court filed its order denying Wilton's Rule 40 Petition. Wilton, pro se, filed on February 15, 2005 a notice of appeal, in which he stated that he had not received the circuit court's order until January 15, 2005 because the order had not been mailed until January 11, 2005 to him in Oklahoma.

On appeal, Wilton contends the circuit court erroneously denied his Rule 40 Petition where Sereno's failure at trial to present evidence of his Multiple Sclerosis or to present

any evidence at all, including his testimony, in his defense constituted ineffective assistance of counsel. Wilton argues that the circuit court erred in its Findings of Fact 9, 22, 41, 42, 43, 44, 45, 47, and 52, and its Conclusions of Law 1, 2, and 5 were wrong. Wilton further argues that the circuit court applied an erroneous standard (probable instead of possible) in reviewing his ineffective assistance of counsel claim.

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 conclude that Wilton's appeal is without merit. Wilton has not met his burden of establishing ineffective assistance of counsel by showing

1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. To satisfy this second prong, the defendant needs to show a possible impairment, rather than a probable impairment, of a potentially meritorious defense. A defendant need not prove actual prejudice.

State v. Wakisaka, 102 Hawai'i 504, 513-14, 78 P.3d 317, 326-27

(2003) (internal quotation marks, citations, and footnote omitted). Wilton failed to show that the alleged specific errors or omissions of his trial counsel resulted in the possible impairment of a potentially meritorious defense.

Therefore,

The "Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to

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

Release Petitioner from Custody" filed on December 1, 2004 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, March 21, 2007.

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for Petitioner-Appellant.


Chief Judge

Peter A. Hanano,
Deputy Prosecuting Attorney,
County of Mau'i
for Plaintiff-Appellee.


Associate Judge


Associate Judge