

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27504

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

FREDILITO D. ABEJON, Petitioner-Appellant,
STATE OF HAWAII, Respondent-Appellee

K. HAMAKADO
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STATE OF HAWAII

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 05-1-0035 (Cr. No. 99-2335))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Fredilito D. Abejon (Abejon) appeals from the Order Denying Petition for Post-Conviction Relief filed on August 29, 2005 in the Circuit Court of the First Circuit^{1/} (circuit court). Abejon filed his Petition for Post-Conviction Relief (Rule 40 Petition) on May 3, 2005 pursuant to Hawaii Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, the State charged Abejon on December 1, 1999 with Burglary in the First Degree (Count I), in violation of Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993), and Violation of an Order for Protection (Count II), in violation of HRS §§ 586-5.5 (Supp. 2000) and 586-11 (2006 Repl.). The complaint alleged that Abejon intentionally entered or remained unlawfully in a residence owned by Florence Cacal (Count I) and intentionally or knowingly violated a restraining order his ex-girlfriend had obtained against him (Count II).

^{1/} The Honorable Dexter D. Del Rosario presided.

On February 1, 2000, Abejon entered pleas of no contest to Burglary in the First Degree and Violation of an Order for Protection and moved for deferred acceptance of both no contest pleas (DANC plea). The circuit court granted Abejon's motion and deferred his sentence on Count I for five years and on Count II for one year, subject to general and special conditions of deferral. Abejon's special conditions included, among others, that he follow all reasonable instructions from his probation officer and participate in the Hawai'i Sex Offender Treatment Program (SOTP) until clinically discharged with the concurrence of his probation officer. Abejon did not object to these conditions.

Abejon completed approximately 388 hours of sex offender treatment while on probation.

On December 20, 2001, the State filed a motion to set aside Abejon's DANC plea on Count I because (1) Abejon had contact with his girlfriend on three separate occasions after having been instructed by his probation officer not to contact her, and (2) SOTP had terminated Abejon from sex offender treatment. At the hearing on the motion, Abejon stipulated to the State's motion to set aside his plea. The circuit court then granted the State's motion as to Count I, set aside Abejon's DANC plea, accepted his no contest plea, sentenced him to ten years of imprisonment, and filed its order on April 10, 2002.

On July 5, 2002, Abejon filed a Motion for Reconsideration of Sentence, which was denied by the circuit court on August 19, 2002. Abejon did not appeal from his sentence.

Abejon appeared before the Hawai'i Paroling Authority (HPA) on August 5, 2002 for a hearing to set his minimum term of imprisonment. On August 21, 2002, the HPA issued its Notice and Order of Fixing Minimum Term(s) of Imprisonment, setting Abejon's minimum term of imprisonment at four years and six months. In its order, the HPA recommended that Abejon participate in sex offender treatment and noted that parole was subject to Abejon's success in the program.

While in prison, Abejon initially agreed to participate in the sex offender treatment program, filling out and submitting the application and consenting to the release of his prior treatment records to Dr. Coyne, administrator of the Hawai'i Department of Public Safety's SOTP. Before arrangements could be made for treatment, Abejon changed his mind and on August 5, 2004 requested that he be taken off the list for treatment.

On May 3, 2005, Abejon filed his Rule 40 Petition, in which he alleged:

(1) The HPA, Department of Public Safety, and Dr. Coyne violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and

Article I, §§ 2, 5, and 10 of the Hawai'i Constitution by labeling him as a sex offender without his having been convicted of any sex offense, thereby reducing any chance of his gaining a favorable parole without completing the SOTP.

(2) The HPA, Department of Public Safety, and Dr. Coyne violated Article I, § 14 of the Hawai'i Constitution by "the use of privilege confidential communication between petitioner and his counselor(s)/physician."

(3) He was subjected to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, § 12 of the Hawai'i Constitution because the imposition of the label "sex offender" caused him to receive a longer minimum term.

On August 29, 2005, the circuit court filed its Order Denying Petition for Post-Conviction Relief. The court concluded that Abejon's claims were patently frivolous and without a trace of support in the record or from other evidence submitted by Abejon and Abejon had failed to state a claim upon which relief may be granted. Abejon timely appealed.

On appeal, Abejon contends:

(1) A DANC plea cannot be enforced after violation of the defendant's probation status.

(2) A defendant does not have to allege illegal custody or restraint in his Rule 40 Petition; a defendant can collaterally challenge any decision made by the HPA under HRPP

Rule 40(a)(2)(iii) (any ground making the custody, though not the judgment, illegal).

(3) The HPA violated Abejon's liberty interest right under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2 and 5 of the Hawai'i Constitution when the HPA decided that Abejon must complete the SOTP without his having been convicted of a sexual offense.

(4) Abejon has the right to raise the claim of self-incrimination to trigger the protection of the Fifth Amendment to the United States Constitution and Article I, § 14 of the Hawai'i Constitution because his participation in the SOTP would force him to release information about himself, thereby making him "a prime targe for the State to bring up new charges."

(5) The HPA violated Abejon's doctor/patient privilege when, in labeling him a sex offender, the HPA considered records of his confidential and private meetings with his counselor.

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 Abejon's appeal is without merit. HRPP Rule 40(f) ("the court may deny a hearing if the petitioner's claim is patently frivolous and is without a trace of support either in the record or from other evidence submitted by the petitioner").

Abejon agreed to participate in sex offender treatment as a condition of probation and completed approximately 388 hours

of treatment. After Abejon's probation revocation and the HPA hearing setting his minimum term of imprisonment, HPA again recommended that he participate in the SOTP. And then, in prison, Abejon initially agreed to enter sex offender treatment. His classification as a sex offender, whether by the court, the HPA, or the Department of Public Safety, has not run afoul of the due process clause of the United States or Hawai'i Constitutions as set forth in Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997), or Turner v. Hawai'i Paroling Authority, 93 Hawai'i 298, 1 P.3d 768 (App. 2000). Furthermore, there was no abuse of discretion in classifying Abejon as a sex offender based on the history and circumstances of Abejon's underlying offense. State v. Solomon, 107 Hawai'i 117, 130-31, 111 P.3d 12, 25-26 (2005).

Therefore,

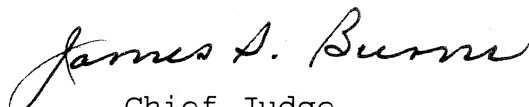
The Order Denying Petition for Post-Conviction Relief filed on August 29, 2005 in the Circuit Court of the First Circuit is affirmed.


DATED: Honolulu, Hawai'i, March 9, 2007.

On the briefs:

Fredilito D. Abejon,
Petitioner-Appellant pro se.

Lisa M. Itomura and
Diane K. Taira,
Deputy Attorneys General,
for Respondent-Appellee.


Chief Judge


Associate Judge


Associate Judge