

NO. 27649

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIIJAMES THOMPSON, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-AppelleeK. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 05-1-0041 (Cr. No. 97-2401))SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant James Thompson (Thompson) appeals from the Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody filed on November 4, 2005 in the Circuit Court of the First Circuit^{1/} (circuit court). Thompson filed his Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody (Rule 40 Petition) on June 2, 2005 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, a jury found Thompson guilty of seven counts of Sexual Assault in the First Degree, two counts of Attempted Sexual Assault in the First Degree, eight counts of Sexual Assault in the Third Degree, two counts of Kidnapping, and one count of Sexual Assault in the Fourth Degree. The circuit court entered its Judgment on January 10, 2001. Thompson appealed,^{2/} alleging that (1) the circuit court erred by denying his motions to (a) suppress the complaining witnesses' identifications, (b) dismiss the indictment with prejudice, and (c) sever the counts against him; (2) the circuit court erred by

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

^{2/} This court takes judicial notice of the record and files in Cr. No. 97-2401 and Supreme Court No. 24078.

failing to adequately instruct the jury; and (3) the prosecutor's question regarding the absence of similar cases after Thompson's arrest was prosecutorial misconduct. On June 2, 2004, the Hawai'i Supreme Court in its Summary Disposition Order (SDO) filed in No. 24078^{3/} affirmed Thompson's conviction, holding that (1) Thompson's brief was not in conformity with Hawai'i Rules of Appellate Procedure (HRAP) Rules 28(b)(4) (2000) and 30 (2000), (2) the circuit court did not err in denying his motions to suppress and to dismiss, (3) Thompson waived his claim that the circuit court abused its discretion in denying his motion to sever, (4) the prosecutor's question regarding the absence of similar attacks did not contribute to Thompson's conviction, and (5) Thompson failed to demonstrate plain error as to his jury instruction claim.

In his Rule 40 Petition, Thompson alleged:

Ground one: He was denied effective assistance of counsel at trial because his counsel failed to: adequately and effectively investigate and prepare for trial, independently test the DNA evidence, consult with a DNA expert regarding the State's DNA testing and results, to present exculpatory evidence and adequately cross-examine witnesses, and renew Thompson's motion to sever the counts against him during trial (which resulted in the supreme court's finding that Thompson had waived this claim on appeal).

Ground two: He was denied effective assistance of appellate counsel because his appellate counsel failed to conform Thompson's brief(s) to the requirements of HRAP Rules 28(b)(4) and 30 (which resulted in the Hawai'i Supreme Court finding that Thompson waived his claims of error and failed to demonstrate plain error) and failed to raise all viable issues on appeal.

^{3/} This court takes judicial notice of the records and files in S. Ct. No. 24078.

Ground three: He was denied due process where his motion to sever the counts was denied.

Ground four: He was denied due process because the circuit court did not adequately instruct the jury.

Ground five: He was denied due process where his motion to suppress the complaining witnesses' identifications was denied because the identifications were both impermissibly suggestive and unreliable.

Ground six: He was denied due process where his motion to dismiss because of prosecutorial misconduct (the prosecutor's conduct caused a mistrial and the prosecutor elicited evidence that no similar sexual assaults had occurred after Thompson's arrest) was denied.

Ground seven: He was denied due process because the circuit court had sentenced him to an extended term of imprisonment without a jury finding that an extended term was necessary for protection of the public.

On November 4, 2005, the circuit court denied Thompson's Rule 40 Petition, finding that Thompson's claims were patently frivolous and without a trace of support either in the record or from other evidence submitted by him and that he had, therefore, failed to state a claim upon which the court might grant relief. Thompson timely appealed.

On appeal, Thompson contends the circuit court erred in denying his Rule 40 Petition without a hearing because he presented the following colorable claims:

(1) His trial counsel was ineffective because counsel did not independently test physical evidence, specifically the shirt of one of the complaining witnesses, for DNA analysis and failed to consult with an independent DNA expert regarding the State's DNA testing and results.

(2) His appellate counsel was ineffective because appellate counsel failed to conform Thompson's brief(s) to HRAP Rule 28(b)(4), which resulted in the Hawai'i Supreme Court holding that Thompson had waived his claims of error.

(3) His appellate counsel was ineffective because counsel failed to conform Thompson's brief(s) to HRAP Rule 30 as to his appeal of the denial of his motion to suppress the complaining witnesses' identifications.

(4) His appellate counsel was ineffective because counsel failed to conform Thompson's brief(s) to HRAP Rule 28(b)(4), which resulted in the Hawai'i Supreme Court holding that Thompson had waived his claims of error as to the jury instructions and had failed to demonstrate plain error.

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 Thompson's appeal is without merit.

When reviewing a claim of ineffective assistance of counsel, this court looks at whether defense counsel's assistance was within the range of competence demanded of attorneys in criminal cases. The defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 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.

State v. Wakisaka, 102 Hawai'i 504, 513-14, 78 P.3d 317, 326-27 (2003) (internal quotation marks, citations, and footnote omitted).

As to whether trial counsel erred in failing to independently test the DNA evidence from the shirt of one of the complaining witnesses, Thompson points to no reason why such was necessary or what would have been accomplished as a result, i.e., he does not argue that Cellmark Diagnostics' method of testing or procedure in testing resulted in an improper result in this case.

Thompson provides no reason as to why his trial counsel was ineffective for failing to have the shirt independently tested. There was more than the DNA evidence from the shirt linking Thompson to the sexual assaults. Five girls unequivocally identified Thompson as their assailant, four girls identified his car as the car in which they were assaulted, and five girls testified to his conduct during the assaults and to what he said thereafter, evincing his modus operandi. The Oahu Community Correctional Center logs showed that Thompson was not working at the time four of the girls were assaulted and had finished work at the time one of the girls was assaulted. Aside from the DNA evidence, the evidence in support of his convictions was overwhelming. Thus, even if Thompson were able to show that trial counsel committed an error or omission, he cannot meet the second prong of his ineffective assistance claim by showing that counsel's failure to independently test the shirt resulted in the withdrawal or substantial impairment of any potentially meritorious defense. And, as to Thompson's allegation that the record does not reflect that trial counsel consulted with an independent DNA expert in preparation for trial, the record reflects that counsel was conversant with the various DNA methods of testing, challenged Cellmark Diagnostics' credentials, methodology, and expertise, and extensively cross-examined both Colombo and Word in that regard, as well as with respect to Cellmark's actual testing procedures. No error occurred here as well.

Thompson contends that because his appellate counsel failed to conform Thompson's brief(s) in No. 24078 to HRAP Rules 28(b)(4) and 30, the Hawai'i Supreme Court denied his argument that the circuit court had erred in denying his motion to suppress the identifications by the complaining witnesses. However, in its SDO, the Hawai'i Supreme Court ruled on this

issue: "State v. Okumura, 78 Hawai'i 383, 391, 894 P.2d 80, 88 (1995) (if an eyewitness identification is deemed impermissibly or unnecessarily suggestive, then the court considers other factors indicating the reliability of the identification)."

Thompson contends his appellate counsel was ineffective because Thompson's brief(s) in No. 24078 did not comply with HRAP Rule 28(b)(4) and therefore Thompson waived his claims of error regarding jury instructions and failed to demonstrate plain error. In its SDO, the Hawai'i Supreme Court held that although Thompson "waived his claims of error regarding the jury instructions given in the instant case, he nevertheless fails to demonstrate plain error." The Hawai'i Supreme Court concluded that Thompson's substantial rights were not affected adversely in that any error in the instructions did not contribute to Thompson's convictions.

Therefore,

The Order Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody filed on November 4, 2005 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, September 24, 2007.

On the briefs:

Keith S. Shigetomi
for Petitioner-Appellant.

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



Chief Judge


Associate Judge
Associate Judge