

NO. 27668

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

JASON KELLY ANDREWS, Petitioner-Appellant, v
STATE OF HAWAI'I, Respondent-Appellee

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

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Cr. No. 03-1-279K; SPP No. 05-1-006K)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Nakamura, and Fujise, JJ.)

Petitioner-Appellant Jason Kelly Andrews (Andrews) appeals from an order denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief entered by the Circuit Court of the Third Circuit (the circuit court)¹ on November 17, 2005. Andrews contends that allowing a judge other than the sentencing judge to decide his HRPP Rule 35² motion to reduce his sentence to conform to his plea agreement with Plaintiff-Appellee State of Hawai'i violated Canon 3(B)(1) of the Revised Code of Judicial Conduct³ and his constitutional right to due process.

¹ The Honorable Elizabeth A. Strance presided.

² Hawai'i Rules of Penal Procedure (HRPP) Rule 35 (2006), in relevant part, provides:

Rule 35. CORRECTION OR REDUCTION OF SENTENCE.

. . . .
(b) Reduction of Sentence. The court may reduce a sentence within 90 days after the sentence is imposed, A motion to reduce sentence that is made within the time prior shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

³ Canon 3(B)(1) of the Revised Code of Judicial Conduct (1992) provides: "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required."

The record on appeal indicates, however, that Andrews raised this same issue when he filed a motion for reconsideration of the non-sentencing judge's denial of his HRPP Rule 35 motion. The record also indicates that the motion for reconsideration was never decided. "Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived." HRPP Rule 40(a)(3) (2006).

Additionally, the basis for Andrews' petition for HRPP Rule 40 relief is not one of the grounds for seeking relief authorized by HRPP Rule 40(a)(1) or (2).⁴

⁴ HRPP Rule 40 (2006), entitled "Post-Conviction Proceeding[,]" in relevant part, provides:

(a) Proceedings and grounds. The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:

(1) FROM JUDGMENT. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i;

(ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter;

(iii) that the sentence is illegal;

(iv) that there is newly discovered evidence; or

(v) any ground which is a basis for collateral attack on the judgment.

For the purposes of this rule, a judgment is final when the time for direct appeal under Rule 4(b) of the Hawai'i Rules of Appellate Procedure has expired without appeal being taken, or if direct appeal was taken, when the appellate process has terminated, provided that a petition under this rule seeking relief from judgment may be filed during the pendency of direct appeal if leave is granted by order of the appellate court.

(2) FROM CUSTODY. Any person may seek relief under the procedure set forth in this rule from custody based upon a judgment of conviction, on the following grounds:

(continued...)

In light of the record on appeal and after duly considering and analyzing the law relevant to the arguments and issues raised by the parties, we conclude that the circuit court did not err in denying Andrews' HRPP Rule 40 petition without a hearing. The Order Denying Rule 40 Petition for Post-Conviction Relief is affirmed.

DATED: Honolulu, Hawai'i, August 29, 2007.

On the briefs:

Deborah L. Kim,
deputy public defender,
State of Hawai'i,
for defendant-appellant.

Corinne Ka Watanabe

Craig A. Nakamura

Carol S. W. Kitaoka,
deputy prosecuting attorney,
County of Hawai'i,
for plaintiff-appellee.

Quana A. M. Fujimura

⁴(...continued)

- (i) that sentence was fully served;
- (ii) that parole or probation was unlawfully revoked;

or

- (iii) any other ground making the custody, though not the judgment, illegal.