

NO. 27805

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

STEVEN M. HAUGE, Petitioner-Appellant, v.  
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(S.P.P. NO. 04-1-0026; CR. NO. 01-1-2345)

E.M. RIVARDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Steven M. Hauge (Hauge) appeals from the "Order Summarily Denying Second Petition for Post-Conviction Relief" (Order) filed on February 27, 2006 in the Circuit Court of the First Circuit (circuit court).<sup>1</sup>

On May 1, 2002, a jury found Hauge guilty of Burglary in the First Degree in violation of Hawaii Revised Statutes (HRS) § 708-810(1)(c) (1993).<sup>2</sup> On July 2, 2002, the circuit court sentenced Hauge to an extended indeterminate twenty-year term of imprisonment as a "persistent offender." On July 31, 2002 Hauge filed his Notice of Appeal. On November 18, 2003 the Hawai'i Supreme Court affirmed Hauge's conviction in the published opinion State v. Hauge, 103 Hawai'i 38, 79 P.3d 131 (2003).

On January 23, 2004, Hauge filed a Petition for Post-Conviction Relief (First Petition) under Special Proceedings Prisoner (SPP) No. 04-1-0005, alleging that the Hawai'i Paroling Authority acted illegally when it determined his minimum term of imprisonment. Hauge represented himself pro se. The circuit court summarily denied that petition on December 1, 2005.

On March 25, 2004, Hauge, again representing himself pro se, filed the instant Petition for Post-Conviction Relief

<sup>1</sup> The Honorable Patrick W. Border presided.

<sup>2</sup> The Honorable Marie N. Milks presided.

(Second Petition) in the circuit court.<sup>3</sup> Hauge raised a number of issues in his Second Petition, including: (1) that his "conviction was obtained by the use of evidence that was obtained pursuant to an unconstitutional and/or unlawful search and seizure[,] and that his trial counsel was ineffective for conceding this point; (2) "[t]he conviction was obtained by the unconstitutional and/or unlaw[ful] failure of the prosecution to disclose evidence that was favorable to Petitioner[;]" (3) "[t]he conviction was not supported by substantial evidence to establish every element of the offense of Burglary in the First Degree[;]" (4) he "was denied his constitutional right to a fair trial," because the circuit court permitted an "undisclosed witness" to testify, "a picture that identified Hauge as a murderer was admitted[,] and his trial counsel was ineffective for not raising these issues; (5) he "was denied his constitutional and statutory right to a fair and appropriate sentencing when the court sentenced him to an extended term of imprisonment[;]" and (6) he "was denied his constitutional right to effective assistance of counsel both at trial and on appeal."

On February 27, 2006, the circuit court filed its Order Summarily Denying Second Petition For Post-Conviction Relief stating, "[P]ursuant to [Hawai'i] Rules of Penal Procedure [(HRPP)], Rule 40 [the] Second Petition for Post-Conviction Relief is summarily denied without hearing."

On appeal, Hauge contends that:

The trial court committed reversible error in denying Appellant's Rule 40 Petition without a hearing. No findings of fact or conclusions of law were entered by the trial court. Additionally, the trial court did not deem the claims in the Petition to be patently frivolous. Appellant maintains as set forth in his Rule 40 petition, that he established error by the trial court allowing his judgment and conviction to withstand scrutiny as the allegations of the petition showed that if taken as true the facts alleged would change the verdict. Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court.

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<sup>3</sup> Although Hauge represented himself in the circuit court proceedings, he is represented by Attorney Shawn A. Luiz on this appeal.

After a careful review of the record and the briefs submitted by both parties, and having given due consideration to the arguments advanced, we resolve Hauge's points of error as follows:

1. Although the circuit court did not explicitly state that it was denying a hearing because Hauge's claims were "patently frivolous and . . . without trace of support either in the record or from other evidence submitted by [Hauge,]" see HRPP Rule 40(f), that failure does not require reversal in the circumstances of this case. While the Hawai'i Supreme Court in Cacatian v. State, 70 Haw. 402, 772 P.2d 691 (1989) noted that the circuit court had "erred" in not explicitly making such a finding, the supreme court went on to consider the various claims raised by the petitioner and remanded only with regard to one claim that the supreme court could not determine was "patently frivolous and without a trace of support in the record and other papers." Id. at 404, 772 P.2d at 692-93. Similarly here, while the circuit court erred in not making an express finding, we are able to determine that the claims were patently frivolous and without a trace of support in the record and other papers. Accordingly, the circuit court did not err in denying the petition without a hearing.

2. Hauge contends that the circuit court erred in not entering findings of fact or conclusions of law. However, "[i]nasmuch as HRPP Rule 40(f) does not require findings of fact and conclusions of law when determining that a petitioner is not entitled to a hearing, Appellant's claim is without merit." Stanley v. State, 76 Hawai'i 446, 449, 879 P.2d 551, 554 (1994) (citation omitted).

3. Hauge waived the issues that he raises in the Second Petition because he had the opportunity to raise them in his First Petition, but failed to do so. HRPP Rule 40(a)(3) states in pertinent part that:

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. Except for a claim of illegal sentence, an issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

HRPP Rule 40(a)(3) (emphasis added).

Hauge maintains that because he was represented by the same counsel (the Office of the Public Defender) at trial and on appeal, he did not waive his claims of ineffective assistance of trial counsel based on the failure of the same counsel to make those claims on appeal. See Briones v. State, 74 Haw. 442, 459, 848 P.2d 966, 975 (1993) (stating that "[w]here petitioner has been represented by the same counsel both at trial and on direct appeal, no waiver of the issue of trial counsel's performance occurs because no realistic opportunity existed to raise the issue on direct appeal"). However, Hauge represented himself pro se on his First Petition, and thus there was no impediment to him raising claims for ineffective assistance of counsel in that petition.

Because Hauge neither rebuts HRPP Rule 40's presumption, nor establishes that extraordinary circumstances caused his failure to raise in his First Petition the issues that he now asserts in his Second Petition, those issues are waived. Although pro se appellants are given wider latitude in terms of the form of their HRPP Rule 40 petitions, they are nevertheless required to assert the grounds upon which they seek relief. See Stanley v. State, 76 Hawai'i 446, 450, 879 P.2d 551, 555 (1994) (stating that while the pro se appellant "should not suffer for his inability to articulate his claims, Appellant, as pro se petitioner, still must alert the court to the general issue that is the basis of his claim[.]" (citation, brackets, and internal quotation marks omitted)). Additionally, not only does Rule

40(a)(3) state that there is a rebuttable presumption that failure to raise an issue constitutes a knowing and understanding waiver, HRPP Rule 40 Form A, which Hauge used for both of his petitions, specifically stated "CAUTION: If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date."

In sum, because Hauge failed to include in his First Petition the grounds which he now raises in his Second Petition, Hauge's claims in the Second Petition were waived and the circuit court accordingly acted appropriately when it denied the Second Petition without a hearing.

3. In any event, we have examined Hauge's contentions in the Second Petition and have determined that they failed to establish a colorable claim. See State v. Ng, 105 Hawai'i 74, 76, 93 P.3d 1181, 1183 (App. 2004) (stating, "Where examination of the record of the trial court proceedings indicates that the petitioner's allegations show no colorable claim, it is not error to deny the petition without a hearing." (block quote format and citations omitted)). The affidavit in support of the search warrant in the robbery case contained facts that were sufficient, when read in a "commonsense and realistic" way, to establish probable cause that Hauge had committed the robbery and that "perspiration, and/or blood" found on the rock would match his DNA profile. State v. Sherlock, 70 Haw. 271, 274, 768 P.2d 1290, 1293 (1989); see also State v. Maganis, 109 Hawai'i 84, 87, 123 P.3d 679, 682 (2005). Hauge's trial counsel asked the circuit court to review the probable cause determination, and the circuit court concluded that the warrant was supported by probable cause. Hauge, 103 Hawai'i at 43-44, 79 P.3d 136-37. Hauge's appellate counsel's omission of this issue on direct appeal was a reasonable tactical decision. See Briones, 74 Haw. at 466-67, 848 P.2d at 977-78.

Hauge's claims that the State failed to disclose exculpatory evidence, used unduly prejudicial evidence, called a surprise witness, and improperly coached that witness are not

supported by the record; there was substantial evidence to convict Hauge of Burglary in the First Degree, based on the presence of his blood in the burglarized room and testimony that he entered a pawn shop a short time after the burglary with items similar to those taken in the burglary, see Hauge, 103 Hawai'i at 42, 79 P.3d at 135; and Hauge's claim that he received an unlawful sentence is moot, since the United State District Court for the District of Hawaii ordered that Hauge be resentenced in Hauge v. Peyton, No. 1:04CV378 (DAE-KSC), 2006 U.S. Dist. LEXIS 56797, at \*14 (D. Haw. Aug. 14, 2006). Moreover, in view of our resolution of the foregoing issues, Hauge has failed to establish that either his trial or appellate counsel were ineffective.

Accordingly, we affirm the "Order Summarily Denying Second Petition for Post-Conviction Relief" filed on February 27, 2006 in the Circuit Court of the First Circuit.

DATED: Honolulu, Hawai'i, September 28, 2007.

On the briefs:

Shawn A. Luiz,  
for Petitioner-Appellant.

Brian R. Vincent,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Respondent-Appellee.



Chief Judge



Associate Judge



Associate Judge