NO. 27810

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

NATHANIEL BONTY, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 05-1-0065 (Cr. No. 58523))

SUMMARY DISPOSITION ORDER
(By: Watanabe, Presiding Judge, Foley and Nakamura, JJ.)

Petitioner-Appellant Nathaniel Bonty (Bonty), pro se, appeals from the Findings of Fact, Conclusions of Law, and Order Denying Petition for Post-Conviction Relief Without a Hearing (Order) filed on February 23, 2006 in the Circuit Court of the First Circuit[1/] (circuit court). Bonty filed his "Petition to Vacate, Set Aside or Correct Illegal Sentence Through a Writ of Habeas Corpus Pursuant to HRPP Rule 40" and his 54-page "Memorandum in Support of Petition for Writ of Habeas Corpus Pursuant to HRPP Rule 40" (Rule 40 Petition) on October 12, 2005 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case (Cr. No. 58523), Bonty was charged with Promoting a Dangerous Drug in the First Degree in violation of Hawaii Revised Statutes (HRS) § 712-1241(1)(b)(ii)(A) (1985). Bonty waived his right to a jury trial, and, after a bench trial, the circuit court found Bonty guilty and sentenced him to 20 years of imprisonment. The circuit court entered its judgment on September 1, 1999. Bonty appealed (appeal No. 22861), and on June 13, 2001, this court

---

[1/] The Honorable Derrick H.M. Chan presided.

affirmed his conviction.[2/] On July 2, 2001, the Hawai'i Supreme Court denied Bonty's application for a writ of certiorari.

On December 14, 1999, Bonty and his counsel appeared before the Hawai'i Paroling Authority (HPA) for the setting of Bonty's minimum term of imprisonment (minimum term). On December 15, 1999, HPA issued an order setting Bonty's minimum term at 15 years; however, the order failed to include either the Level of Punishment or the significant criteria upon which HPA based its decision.

On April 14, 2003, Bonty applied to HPA for reconsideration of his minimum term. HPA denied his request.

On June 10, 2003, the Department of the Attorney General, State of Hawai'i, issued an Expungement Certificate, annulling Bonty's record of arrest for 10 non-conviction offenses in Hawai'i.

On December 31, 2003, HPA issued an amended order setting Bonty's minimum term at 15 years and identifying Bonty's Level of Punishment as Level III and the significant factors in determining his level as (1) the nature of the offense and (2) his criminal history.

On January 14, 2004, Bonty filed a petition for post-conviction relief under S.P.P. No. 04-1-0002 (First Petition), alleging that (1) in light of the Certificate of Expungement issued by the Department of the Attorney General, HPA arbitrarily and capriciously abused its discretion when it denied Bonty's request to reconsider his minimum term; (2) HPA violated his constitutional right to due process by deviating from its own Guidelines for Establishing Minimum Terms of Imprisonment (Guidelines) without providing the required written justification and HPA's actions were retaliatory in nature; (3) HPA should have

---

[2/] This court takes judicial notice of the records and files in Cr. No. 58523 and appeal Nos. 22861 and 27205.

reduced his level of punishment to Level II because his arrest records had been expunged and he had completed many programs; (4) HPA acted arbitrarily or capriciously in setting his minimum term at 15 years; and (5) HPA acted arbitrarily and capriciously in violation of Bonty's constitutional right to due process. On February 1, 2005, the court denied the petition without a hearing, finding that Bonty's claims were patently frivolous and without support in the record and Bonty failed to state a colorable claim. On March 31, 2005, Bonty appealed (appeal No. 27205). On August 30, 2005, the Hawai'i Supreme Court dismissed Bonty's appeal for his failure to timely file his notice of appeal.

Bonty then filed his Rule 40 Petition, in which he argued:

1. He was denied due process of law, illegally restrained, and subjected to an arbitrary and capricious setting of his minimum term when HPA (a) concluded that under HRS § 831-4 (1993) it was exempt from adherence to the valid expungement order issued, pursuant to HRS 831-3.2 (1993), by the State of Hawai'i's Attorney General, and (b) relied on expunged criminal charges as a factor in determining Bonty's level of punishment as a Level III instead of a Level II, thereby resulting in a minimum term of 15 years until parole eligibility and in Bonty's continued housing in a higher security facility.

2. HPA's setting of Bonty's minimum term outside the range that HPA had set for other offenders with the same charge and equal or greater criminal histories violated Bonty's constitutional rights to due process, was an illegal restraint of his liberty, and was arbitrary and capricious.

3. HPA's illegal setting of his minimum term resulted in the Department of Public Safety (DPS) imposing a more severe and prolonged restraint on his liberty, which barred him from participating in any community-based work furlough program or obtaining housing in a lower security facility.

4. Bonty suffered actual prejudice in that his opportunity for parole and the illegal restraint on his liberty were prolonged when DPS set his level of classification and programming recommendations based in part on his minimum term.

5. HPA's preconditions of parole -- that Bonty participate in substance abuse treatment, sex offender treatment, and cognitive skills -- violated Bonty's constitutional rights because (a) he was not before HPA for any sexual offense and any information used by HPA to assess him as a sexual offender had been expunged and thus was an impermissible consideration, and (b) Bonty was not provided with an adversarial hearing to prove that he should have either a sex offender classification or a substance abuse classification.

6. HPA and DPS should be barred under law from imposing the stigmatizing labels of sex offender or substance abuser upon Bonty when the court had not sentenced Bonty for those crimes.

7. HPA may not legally set Bonty's minimum term of imprisonment equal to his maximum term of imprisonment under Hawai'i's statutory scheme.

8. HPA's violations of Bonty's constitutional rights warrants a classification hearing.

The State filed its answer on November 16, 2005. On February 23, 2006, the circuit court entered its Order, in which it held that:

1. Bonty's allegations that HPA improperly considered expunged criminal records in determining his minimum term and HPA failed to adhere to its own Guidelines had been previously raised and ruled upon in S.P.P. No. 04-1-0002.

2. Bonty's allegations that HPA discriminated against him because his minimum term departed from minimum terms set for other offenders with the same offense and HPA improperly

recommended he participate in substance abuse and sex offender treatment had been waived because Bonty had the opportunity to raise these issues and failed to do so in S.P.P. No. 04-1-0002 and Bonty had not presented any facts to rebut the presumption that the failure to raise these issues was a knowing failure nor had Bonty proved the existence of extraordinary circumstances to justify the failure to raise the issues.

3. Bonty's claims that DPS improperly used HPA's setting of minimum term in setting his security classification and housing and HPA improperly set his minimum term the same length as his maximum sentence were without merit since the court had determined in S.P.P. No. 04-1-0002 that HPA had properly set his minimum term and thus DPS's reliance on HPA's minimum term set was not improper.

4. Bonty's contention that HPA set his minimum term the same length as his maximum sentence was patently frivolous since HPA had set Bonty's minimum term for 15 years out of a maximum sentence of 20 years.

5. Bonty's allegations failed to show a colorable claim and thus Bonty was not entitled to a hearing on his Rule 40 Petition.

On appeal, Bonty contends:

(1) The circuit court erred when it determined in Conclusion of Law (COL) 4 of the Order that Bonty's failure to raise his claims that HPA had discriminated against him when his minimum term departed from minimum terms set for other offenders convicted of the same offense and HPA had improperly recommended that he participate in substance abuse and sex offender treatments were not excused by the extraordinary circumstance of Bonty's reliance on Express Legal Services to perfect his appeal.

(2) The circuit court erred when it determined Bonty's claim that HPA's setting of Bonty's minimum term was "arbitrary and capricious" had been previously raised in S.P.P. 04-1-0002 and had been ruled upon.

(3) The circuit court erred when it did not recognize that HPA continually and presently imposed preconditions for Bonty's parole pursuant to HRS § 353-64 (1993) (Committed Persons Paroled), namely, substance abuse and sex offender treatment, and that HPA stated in its denial of Bonty's application for reduction of minimum term the HPA's imposition of these preconditions for parole.

(4) The circuit court erred in its COL 6 when the court found Bonty's claim that HPA had set his minimum term the same length as his maximum term was patently frivolous; the holding in Williamson v. Hawaii Paroling Authority, 97 Hawai'i 183, 35 P.3d 210 (2001), violated federal and state constitutions; and Bonty had a statutorily created right to have his minimum term set at a period less than his maximum term.

(5) In conflict with Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997), Bonty was not given a hearing by HPA or DPS to challenge the setting of his minimum term equal to his maximum term or the parole preconditions that he attend substance abuse and sexual offender programs.

(6) The circuit court erred when it failed to recognize that Bonty's claim of actual prejudice arising from DPS's restraint of Bonty's liberty was a new claim, and Bonty was entitled to a hearing on this claim.

(7) The circuit court erred in its COL 4 when it found that there was no recognizable claim that HPA had violated HRS § 353-64 when it imposed preconditions of parole upon Bonty while Bonty was housed at a correctional facility where these preconditions were not available or Bonty had not been properly assessed by a Certified Substance Abuse Counselor, and Bonty was entitled to a hearing on this claim.

(8) The circuit court erred in its COL 3 when it determined Bonty's claim that HPA improperly considered expunged criminal records in determining his minimum term had been

previously raised and ruled upon because HRS § 831-4(a) applied only to conditions of parole and not to the setting of minimum terms.

(9) HPA was "arbitrary and capricious" when it used as a criterion for setting his minimum term the "second area of focus" entitled "the degree of injury/loss to person or property" and set Bonty's minimum term extraordinarily outside the range of minimum terms set for offenders convicted of the same offense with similar or more extensive criminal histories, and when it misapplied the "third area of focus" entitled "criminal history."

(10) The circuit court erred when it found that Bonty's claim that HPA had failed to adhere to its own Guidelines in setting his Level of Punishment did not result in any actual prejudice to Bonty.[3/]

(11) The circuit court erred when it did not recognize that Bonty's classification and required treatment programs were erroneously based on his being a sex offender and substance abuser, where he had not been convicted of either of those charges and all information regarding any previous sexual offenses had been expunged.

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 hold that the circuit court properly denied Bonty's claims as "previously ruled upon or . . . waived." HRPP Rule 40(a)(3). Additionally, Bonty's claims were "patently frivolous and . . . without trace of support either in the record or from other evidence submitted" by Bonty. HRPP Rule 40(f); Williamson v. Hawaii Paroling Authority, supra.

Therefore,

[3/] The circuit court actually found in its COL 3 that Bonty's claim that HPA had failed to adhere to its own Guidelines had been previously raised and ruled upon.

The Findings of Fact, Conclusions of Law, and Order Denying Petition for Post-Conviction Relief Without a Hearing filed on February 23, 2006 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawaiʻi, November 21, 2007.

On the briefs:

Nathaniel Bonty,
Petitioner-Appellant pro se.

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

Corinne K.A. Watanabe
Presiding Judge

Daniel R. Foley
Associate Judge

Craig S. Nakamura
Associate Judge