

NO. 27947

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

RICHARD JERNIGAN, Petitioner-Appellant,  
v.  
STATE OF HAWAI'I, Respondent-Appellee

L.M. FERRANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

2007 JUL 25 AM 7:49

FILED

SPECIAL PROCEEDINGS PRISONER NO. 05-1-0075  
(CR. NO. 93-2173)

SUMMARY DISPOSITION ORDER

(By: Recktenwald, Chief Judge, Watanabe, and Nakamura, JJ.)

Petitioner-Appellant Richard Jernigan (Jernigan) appeals from the "Findings of Fact, Conclusions of Law, and Order Dismissing Petition for Post-Conviction Relief Without a Hearing" entered on April 19, 2006, by the Circuit Court of the First Circuit (circuit court).<sup>1</sup> We affirm.

In the underlying criminal case, Jernigan was indicted on September 2, 1993, and charged with second degree murder (Count 1) and using a firearm in the commission of a felony (Count 2). After a jury trial, he was found guilty of the lesser included offense of manslaughter on Count 1 and guilty as charged on Count 2. Respondent-Appellee State of Hawai'i (the State) moved for extended terms of imprisonment on the ground that Jernigan was a dangerous person whose imprisonment for an extended term was necessary for the protection of the public, pursuant to Hawaii Revised Statutes (HRS) Section 706-662(3) (1993). On August 8, 1994, the circuit court granted the State's motion and sentenced Jernigan to concurrent terms of twenty years' imprisonment on Count 1 and life imprisonment with parole on Count 2.

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<sup>1</sup> The Honorable Karl K. Sakamoto presided.

On September 7, 1994, Jernigan appealed from his judgment of conviction and sentence. By summary disposition order dated January 13, 1997, the Hawai'i Supreme Court affirmed the judgment.

On August 21, 2002, Jernigan filed a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 Petition for post-conviction relief (the 2002 Rule 40 Petition). The 2002 Rule 40 Petition was denied by order filed on August 19, 2003 (the 2003 Order).<sup>2</sup> Jernigan's appeal from the 2003 Order was dismissed by the Hawai'i Supreme Court because his notice of appeal was not timely filed.

On November 9, 2005, Jernigan filed a Petition for Post Conviction Relief (the 2005 Rule 40 Petition) in the current case, alleging two grounds for relief:

Ground one: Denial of effective assistance of counsel.

Supporting FACTS . . . : Defendant was denied effective assistance of counsel by [the Deputy Public Defender's] failure to advise the defendant of his statutory right to hear and controvert the evidence against him in a proceeding for the enhancement of sentence.

Ground two: Sentence enhanced by violation of Psychologist-client privilege.

Supporting FACTS . . . : The court enhanced defendant's sentence illegally by ordering the psychologists to submit reports for the determination that defendant had a significant past history of violence. The records indicate to the contrary and should [the Deputy Public Defender] investigated he would have evidence supporting a defense to controvert.

On the same day that he filed his 2005 Rule 40 Petition, Jernigan filed a "Motion for Correction of Illegal Sentence" in the underlying criminal case, arguing that his extended term sentences were illegal based on Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny, Blakely v. Washington, 542 U.S. 296 (2004), and Kaua v. Frank, 350 F.Supp.2d. 848 (D. Haw. 2004), aff'd, 436 F.3d 1057 (9th Cir. 2006). The circuit court designated Jernigan's Motion for

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<sup>2</sup> The Honorable Karen S.S. Ahn presided.

Correction of Illegal Sentence as a non-conforming petition for post-conviction relief pursuant to HRPP Rule 40(c)(2). The circuit court therefore treated Jernigan's Motion for Correction of Illegal Sentence as an additional ground for post-conviction relief sought by Jernigan pursuant to his 2005 Rule 40 Petition.

On April, 19, 2006, the circuit court issued its "Findings of Fact, Conclusions of Law, and Order Dismissing Petition for Post-Conviction Relief Without a Hearing," which addressed all of Jernigan's claims for post-conviction relief. The circuit court summarily dismissed the two grounds asserted by Jernigan in his 2005 Rule 40 Petition because they had been previously ruled upon by the court in denying his 2002 Rule 40 Petition. The circuit court also dismissed the Apprendi-related claim Jernigan raised in his Motion for Correction of Illegal Sentence. The court concluded that Apprendi does not apply retroactively and that Jernigan's conviction became final in 1997, when the Hawai'i Supreme Court affirmed his judgment.

On appeal, Jernigan abandons the two grounds he asserted in his 2005 Rule 40 Petition and only argues the Apprendi-related claim he raised in his Motion for Correction of Illegal Sentence. Jernigan's Apprendi-related claim is foreclosed by State v. Gomes, 107 Hawai'i 308, 312-14, 113 P.3d 184, 188-90 (2005). In Gomes, the Hawai'i Supreme Court held that "Apprendi does not apply retroactively in this jurisdiction to cases on collateral attack." Gomes, 107 Hawai'i at 314, 113 P.3d at 190; see also United States v. Sanchez-Cervantes, 282 F.3d 664, 667-71 (9th Cir. 2002) (holding that Apprendi does not apply retroactively to cases on collateral review). Jernigan asks that we "rethink" the holding in Gomes and apply Apprendi retroactively to invalidate his extended term sentences. We reject Jernigan's request.

IT IS HEREBY ORDERED that the "Findings of Fact, Conclusions of Law, and Order Dismissing Petition for Post-

Conviction Relief Without a Hearing" entered on April 19, 2006,  
by the circuit court is affirmed.

DATED: Honolulu, Hawai'i, July 25, 2007.

On the briefs:

Richard Jernigan  
for Petitioner-Appellant Pro Se

Loren J. Thomas  
Deputy Prosecuting Attorney  
City and County of Honolulu  
for Respondent-Appellee

*Mum E. Nishimura*

Chief Judge

*Brunie K.A. Watanabe*

Associate Judge

*Craig H. Nakamura*

Associate Judge