

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 27974

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

SUNG JIN KWON, Petitioner-Appellant,
v.
STATE OF HAWAI'I, Respondent-Appellee

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(CASE NO. 1SD06-1-7)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Sung Jin Kwon (Kwon) appeals from the District Court of the First Circuit's (district court) May 11, 2006 order summarily denying Kwon's Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition (petition) without a hearing.¹

According to Kwon's petition, Kwon was "convicted of one count of violation of Section 604-10.5, [Hawaii Revised Statutes] restraining order on or about March 16, 2001."² Kwon's petition alleges that the conviction was based on allegations by the complaining witness (CW) that Kwon violated a temporary restraining order (TRO) by stopping his car near the CW on August 7, 2000 and making a gesture to the CW with the middle

¹ The Honorable Russel S. Nagata presided.

² The record on appeal does not include any transcripts from the March 16, 2001 proceeding, nor does it include any pleadings from the proceeding. Thus, in discussing the March 16, 2001 proceeding, we will refer to the representations contained in Kwon's petition.

finger of his hand. Kwon alleges that he "was sentenced to pay a fine of \$400.00 plus CICF and other court fees." Kwon's petition acknowledges that Kwon did not appeal that conviction.

On May 11, 2006, the district court summarily denied the petition without a hearing, finding that the petition was "without a 'trace of support.'" The district court's order stated "[u]pon a review of the Rule 40 Petition . . . including in particular Exhibits 'A' and 'B',³ this court fails to find any support that the conviction was obtained by the 'unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.'"

Kwon raises the following issues on appeal:

1) "The Trial Court erred in refusing Kwon a hearing on his Petition under Rule 40, HRPP because the evidence justified such a hearing."

2) "The Trial Court erred in failing to consider Exhibit 'C,' to the Petition."

After a careful review of the record and the briefs submitted by both parties, and having given due consideration to the arguments advanced and the issues as raised, we resolve

³ Exhibit "A" includes a copy of the arrest report for Kwon's TRO violation, an incident report dated August 9, 2000 at 1:50 a.m., a copy of the TRO and documentation of service of the TRO on Kwon. Exhibit "B" consists of a copy of a second incident report dated August 9, 2000 at 2:00 a.m., a Statement Form signed by CW and Officer Kailihiwa, an arrest report dated August 9, 2000, a Statement of Receipt of Detainee's Property, as well as another copy of the 1:50 a.m. incident report, the TRO, and a Honolulu police report showing that an attempt at service was made on August 2, 2000. Exhibit "C" consisted of an undated declaration by Dae Sung Bang.

Kwon's points of error as follows:

1) The district court did not err in denying Kwon's petition without a hearing. Kwon argues that he was entitled to a hearing because he did not receive certain police reports during discovery, and because a witness who was not available at the original trial, Dae Sung Bang, would be able to testify in a new trial that Kwon did not violate the restraining order on August 7, 2000.

Kwon's arguments with regard to the State's alleged failure to produce the police reports in discovery are without merit. First, Kwon's petition did not establish that he requested discovery from the State, and that the reports were accordingly improperly withheld from him under HRPP 16.1. Additionally, Kwon's petition does not indicate exactly when he learned of the existence of these reports, and thus Kwon has not rebutted the presumption that his failure to file a direct appeal and raise this issue then constituted a waiver by him. HRPP Rule 40(a)(3).

Moreover, the petition failed to establish that the police reports which Kwon claims he was denied would probably have changed the outcome of the case. Cf. State v. Faulkner, 1 Haw. App. 651, 656, 624 P.2d 940, 944-45 (1981) ("A new trial based on newly discovered evidence is properly granted provided that the evidence meets the following criteria: 1. The evidence

has been discovered after trial; 2. Such evidence could not have been discovered before or at trial through the exercise of due diligence; 3. The evidence is material to the issues and not cumulative or offered solely for purposes of impeachment; and 4. The evidence is of such a nature as would probably change the result of a later trial.") (citation omitted).

Exhibit "C," the declaration by Dae Sung Bang (Bang Declaration), also did not establish a colorable claim that would justify a hearing on Kwon's petition. First, we note that Kwon's petition did not suggest that the declaration itself provided a basis for a new trial; rather, the petition indicated that "Defendant files the instant Petition on the grounds that his rights to due process, specifically, discovery of the identity of a police witness and the witness's purported testimony were denied him, due to the fact that the Prosecuting Attorney's Office did not provide full and complete discovery as required by Rule 16, HRPP." Second, Kwon's petition does not indicate that the substance of the Bang declaration was unavailable to Kwon when he failed to file a direct appeal,⁴ and thus Kwon has again failed to rebut the presumption that his failure to raise this

⁴ Indeed, the petition indicates that Kwon filed a motion for a new trial on June 1, 2001, which included "a statement of another witness, Dae-Sung Bang[.]" Moreover, while the Bang declaration indicates that Bang was "not able to testify for Mr. Kwon in May, 2001 due to [his] immigration status," and that "[he was] now able to testify, and will do so if required by the Court[.]" it does not indicate when Bang's immigration issue was resolved or that he was unavailable to testify when Kwon was required to file his direct appeal from his conviction in 2001.

issue on direct appeal constituted a waiver by him. HRPP Rule 40(a)(3). Finally, the Bang declaration does not comply with the form requirements of the Rules of the District Courts of the State of Hawai'i Rule 7(g) in that it does not state that Bang "declare[d] under penalty of law that [his declaration] is true and correct."

2) We disagree with Kwon's assertion that the district court failed to consider Exhibit "C" to his petition, which was the Bang declaration. The district court's order indicated that "[u]pon review of the Rule 40 Petition . . . including in particular Exhibits 'A' and 'B', this court fails to find any support that the conviction was obtained by the 'unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.'" (Emphasis added.) That passage does not indicate that the district court ignored Exhibit "C" to the petition, but rather that, consistent with the basis for the petition articulated by Kwon (i.e., the alleged withholding of discovery by the State), those two exhibits were particularly relevant to the court's consideration.

Therefore,

IT IS HEREBY ORDERED that the Order Summarily Denying Rule 40 Petition Without Hearing filed on May 11, 2006 in the District Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, December 11, 2007

On the briefs:

Mark S. Kawata
for Petitioner-Appellant.

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



Chief Judge



Associate Judge



Associate Judge