

NO. 28081

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

RICHARD H. MCKINLEY, Petitioner-Appellant, v.  
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(S.P.P. NO. 06-1-0028 (Cr. No. 03-1-1712))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Richard H. McKinley (McKinley) appeals from the Order Denying Defendant's Motion for Post-Conviction Relief filed on July 5, 2006 in the Circuit Court of the First Circuit<sup>1/</sup> (circuit court). Pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40, McKinley, pro se, filed a Petition for Post-Conviction Relief on May 24, 2006 and a Corrected Petition for Post-Conviction Relief on June 21, 2006 (the Petition and Corrected Petition are collectively referred to herein as Rule 40 Petition).

After a bench trial in the underlying criminal case, the circuit court found McKinley guilty of Promoting a Dangerous Drug in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2003), and Unlawful Use of Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993). The circuit court sentenced McKinley to two concurrent sentences of five years' probation and filed its Judgment on December 13, 2004.

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<sup>1/</sup> The Honorable Michael A. Town presided.

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STATE OF HAWAII

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On July 12, 2005, the State of Hawai'i (State) filed a Motion for Revocation of Probation, Resentencing, and Issuance of Bench Warrant based on McKinley's (1) pleading guilty to a charge of Harassment and (2) failing to report to his probation officer, report his change of address and telephone number, notify his probation officer of his arrests for Harassment and Disorderly Conduct and his citation for traffic violations, work full time or attend educational/vocational training, make payments of the court-ordered monthly probation services fee and drug demand reduction assessment fee, refrain from the possession and use of illegal drugs, and obtain substance-abuse and mental-health treatment. At the August 16, 2005 hearing, the circuit court granted the motion to revoke McKinley's probation, discussed finding McKinley residential drug treatment, and stated to McKinley and his counsel: "I'm going to impose a five year prison term on [McKinley] . . . subject to a motion to reconsider, if you can get [McKinley] into . . . some program that makes sense." In its August 16, 2005 Order of Resentencing/Revocation of Probation, the circuit court resentenced McKinley to concurrent terms of imprisonment of five years.

On February 16, 2006, the circuit court heard McKinley's Motion for Reconsideration of Sentence. On March 1, 2006, the circuit court filed its order, in which it found that there were no new circumstances to warrant the granting of the motion and denied the same.

McKinley did not appeal from the revocation of his probation or the denial of his motion for reconsideration.

On May 2, 2006, McKinley, pro se, filed two motions for correction of illegal sentence pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35 (one motion was handwritten and one motion was typewritten). McKinley alleged that the circuit court should not have revoked his probation because this was his first violation and, pursuant to HRS § 706-625 (Supp. 2006), he should have been required to undergo and complete a drug treatment

program as a condition of continued probation instead of being sent to prison. McKinley also alleged that his public defender was ineffective because the public defender did not object to his being sent to prison and did not immediately place McKinley in a drug program as ordered by the circuit court.

On May 8, 2006, McKinley filed a Motion for Appointment of Counsel. At a hearing on May 18, 2006, the circuit court denied McKinley's oral motion to reconsider his sentence and place him in a treatment program instead of prison and granted his motion for new counsel. The circuit court, on May 30, 2006, filed an order granting the motion for new counsel and, on August 4, 2006, appointed counsel for McKinley.

In his Rule 40 Petition, McKinley alleged:

(1) His public defender was ineffective at pre-trial proceedings and for failing to get McKinley into a drug treatment program as ordered by the circuit court at the August 16, 2005 hearing.

(2) The deputy prosecuting attorney failed to disclose to the court that pursuant to HRS § 706-625, McKinley should have been put into a drug treatment program instead of being sent to prison.

On June 23, 2006, the State filed its answer. In its July 5, 2006 Order Denying Defendant's Motion for Post-Conviction Relief, the circuit court found that McKinley had numerous violations of his probation conditions; McKinley mistakenly interpreted HRS § 706-625(7); the State had complied with the proscriptions of HRS § 706-625(7); McKinley's public defender had attempted to obtain financing for McKinley's substance abuse treatment programs through McKinley's Veteran Benefits Programs, but had been unsuccessful, had done "everything in his power to obtain an appropriate and palpable sentence" for McKinley, and was therefore not ineffective; McKinley's being resentenced to prison was due to his inability to comply with the terms and conditions of his probation; and McKinley's claims were patently

frivolous and without trace of support in the record or from evidence submitted by McKinley.

On appeal, McKinley contends:

(1) The circuit court erred by failing to hold a hearing on the issues raised in the Rule 40 Petition, especially the ineffective-assistance-of-counsel claim.

(2) The circuit court should have sentenced McKinley to a drug treatment program instead of prison.

(3) The circuit court should have appointed counsel for McKinley on his Rule 40 Petition.

(4) The circuit court erred in Conclusion of Law (COL) 7 of its Order Denying Defendant's Motion for Post-Conviction Relief when it found that the public defender was not ineffective. Since McKinley was unable to pay for drug treatment for himself, the public defender, pursuant to HRS § 802-7 (1993) (Litigation Expenses), should have gotten McKinley into drug treatment and the Office of the Public Defender should have paid for such treatment.

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 the circuit court properly denied McKinley's Rule 40 Petition. McKinley's Rule 40 Petition alleged no colorable ineffectiveness-of-counsel claim. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994). McKinley also failed to allege any colorable claim as to his sentence upon revocation of probation. HRS § 706-625(3) & (5); State v. Savitz, 97 Hawai'i 440, 443, 39 P.3d 567, 570 (2002). Because McKinley's Rule 40 Petition was "patently frivolous and without a trace of support in the record or other evidence submitted" by McKinley, the circuit court did not err in denying McKinley a hearing on his Rule 40 Petition and in not appointing counsel. HRPP Rule 40(f) & (i).

Therefore,

The Order Denying Defendant's Motion for Post-Conviction Relief filed on July 5, 2006 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 21, 2007.

On the briefs:

Shawn A. Luiz  
for Petitioner-Appellant.

Stephen K. Tsushima,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for Respondent-Appellee.



Chief Judge



Associate Judge



Associate Judge