NO. 26970

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

CHAD D. WILDERMAN, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP No. 04-1-0011)
(Cr. No. 01-1-0422)

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

Petitioner-Appellant Chad D. Wilderman (Wilderman) appeals the Findings of Fact, Conclusions of Law, and Order (the Order) entered by the Circuit Court of the First Circuit[1] (the circuit court) on October 28, 2004, denying, without a hearing, Wilderman's February 4, 2004 Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief (Rule 40 Petition). We affirm.

A.

On February 21, 2001, Respondent-Appellee State of Hawai'i (the State) filed a complaint in the circuit court in Criminal No. 01-1-0422, charging Wilderman with committing the offense of Robbery in the First Degree on January 3, 2001 while armed with a dangerous instrument, in violation of Hawaii Revised Statutes §§ 708-840(1)(b)(ii) (1993 & Supp. 2000)[2] and 706-660.1

[1] The Honorable Virginia Lea Crandall presided.

[2] At the time Petitioner-Appellant Chad D. Wilderman (Wilderman) was charged with committing the offense of Robbery in the First Degree, Hawaii Revised Statutes (HRS) § 708-840 (1993 & Supp. 2000) provided, in relevant part, as follows:

> **Robbery in the first degree.** (1) A person commits the offense of robbery in the first degree if, in the course

(continued...)

(1993).[3] Wilderman's case was subsequently consolidated for trial with that of his co-defendant, Vincent Scanlan (Scanlan). Wilderman and Scanlan are hereinafter referred to as "Defendants."

On August 2, 2001, a jury found Wilderman guilty as charged. The jury also determined that the prosecution had proven beyond a reasonable doubt that Wilderman "had a firearm in his possession or threatened its use or used a firearm while engaged in the offense of Robbery in the First Degree[.]"

(...continued)

of committing theft:

> . . . .
>
> (b) The person is armed with a dangerous instrument and:
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> . . . .
>
> (ii) The person threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.
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> . . . .
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> (3) Robbery in the first degree is a class A felony.

[3] HRS § 706-660.1 (1993) provides currently, as it did when Wilderman was charged, in relevant part, as follows:

> **Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony.** (1) A person convicted of a felony, where the person had a firearm in the person's possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:
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> . . . .
>
> (b) For a class A felony--up to ten years[.]

On August 16, 2001, Wilderman filed a motion for judgment of acquittal after discharge of jury,[4] arguing,[5] as he had during trial, that there was insufficient evidence to sustain his conviction. The circuit court denied Wilderman's motion by an order entered on November 13, 2001.

On August 16, 2001, Wilderman also filed a motion for a new trial pursuant to HRPP Rule 33.[6] In support of this motion, Wilderman attached a declaration by his trial counsel, which stated, in relevant part, as follows:

> 3. The verdict in this matter was returned by the jury on Friday, August 3, 2001. After the jury verdict was returned[,] Roy Apao [(Apao)], a friend of [Wilderman],

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[4] The record on appeal does not contain Wilderman's motion for judgment of acquittal after discharge of jury, although a notice of hearing on the motion filed on August 22, 2001 is included in the record. On May 4, 2005, Wilderman's attorney filed a motion to supplement the record on appeal with Wilderman's motion for judgment of acquittal. On May 10, 2005, the Hawai'i Supreme Court, after noting that Wilderman's motion for judgment of acquittal after discharge of jury was apparently filed on August 16, 2001 in the Circuit Court of the First Circuit (the circuit court) under an incorrect criminal number, Cr. No. 01-0-0422, entered an order denying the motion to supplement the record, without prejudice to Wilderman refiling the motion in the circuit court. The record on appeal does not reflect that Wilderman refiled the motion.

[5] In his opening brief, Wilderman states that his motion for judgment of acquittal after discharge of jury was based on the same grounds as a similar motion made during trial. According to Wilderman, the grounds stated were: (1) "the questionable nature of the identification testimony and the fact that . . . Wilderman's fingerprints were not found at the scene but the fingerprints of another individual were found in the bed of the truck alleged[ly] used by the perpetrators of the crime[;]" and (2) "there was no showing . . . that a theft [had been] committed in the presence of complaining witness Steven Pang, and that under . . . State v. Mitsuda, 86 Haw. 37, 947 P.2d 349 (1997)," Wilderman should be acquitted.

[6] Hawai'i Rules of Penal Procedure Rule 33 provides, in relevant part, as follows:

> **NEW TRIAL.**
>
> The court on motion of a defendant may grant a new trial to him [or her] if required in the interest of justice. . . . A motion for a new trial shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period. The finding of guilty may be entered in writing or orally on the record.

asked if he could speak to me outside of the courtroom. I know who [Apao] is because [Apao] was a witness for [Wilderman] in a criminal case (Burglary in the Second Degree) in which I represented [Wilderman].

4. I know that [Apao] has considered [Wilderman] to be a personal friend of his.

5. [Apao] informed me on that date, August 3, 2001, that prior to the start of the trial[,] he had received a phone call from a friend of his. He would not disclose who that friend was. This friend of [Apao] told [Apao] that Steven Pang [(Pang)], the complaining witness in the above-entitled matter, wanted to meet with [Apao].

6. [Apao] arranged to meet [Pang]. [Apao] did not state when this meeting occurred except that it did occur prior to the start of the trial in this matter (trial stated [sic] in this matter on Monday, July 30, 2001).

7. [Apao] informed me that [Pang] told [Apao] that he wanted $20,000.00 from [Apao] to "drop" the case against [Wilderman]. [Apao] informed me that he attempted to raise this money but was unable to raise the money. When I asked [Apao] for details as to how [Pang] would "drop" the case, [Apao] said that [Pang] was not specific on that point except that [Pang] indicated that he would insure that [Wilderman] was not convicted.

8. I then asked [Apao] why [Pang] would ask for this money. [Apao] stated that [Pang] was having a "hard time" and owed some money and that he needed the money. I further asked [Apao] whether any such proposal was made by [Pang] as to [Scanlan] and [Apao] replied in the negative.

9. [Apao] said that he had only one meeting with [Pang] and did not attempt to contact [Pang] after that one meeting.

10. I was unable to meet with [Wilderman] regarding [Apao's] statements until Monday, August 13, 2001. I asked [Wilderman] if he was ever informed about this meeting between [Apao] and [Pang] and [Wilderman] informed me that he was never told about such a meeting, nor did he know that [Pang] had offered to "drop" the case. [Wilderman] did not know about this until August 13, 2001.

11. On the morning of Monday, August 13, 2001, I received a package that was hand-delivered to my office in a plain envelope. I did not see the person who dropped of [sic] this envelope but the envelope does bear the name "Michelle Uemoto Scanlan". In the envelope was a document entitled "Affidavit of Recantation Made by [complaining witness] Jim Taylor" [(Taylor)] and a video cassette tape. A copy of this document is attached hereto as Exhibit "A". Exhibit "A" has not been altered in any way since I received that document on August 13, 2001.

> 12. I presently have the original of Exhibit "A" in my possession. This original has a notary stamp bearing the name "Ann Au". The original has not been altered since I received it on Monday, August 13, 2001 and is available for inspection by any of the parties.
>
> 13. Also in my possession is a video cassette tape on a smaller Sony format. I have not viewed this video cassette and the original is available for inspection by any of the parties.
>
> 14. Exhibit "A", the statement by [Taylor], is dated August 6, 2001.

The circuit court held an evidentiary hearing on Wilderman's motion for new trial on October 15 and 23, 2001. On December 6, 2001, the circuit court[7] entered its "Findings of Fact, Conclusions of Law, and Order Denying [Wilderman's] Motion for New Trial." The circuit court found, in relevant part, as follows:

> 46. . . . [Defendants'] associates attempted to manufacture "newly discovered evidence" in order to overturn the jury's unanimous verdicts in this case. Specifically, the evidence adduced during the hearing on [Wilderman's] motion for new trial demonstrated that associates of [Scanlan] created a "fake affidavit" and attempted to bribe [Taylor].
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> . . . .
>
> 53. Meanwhile, [Defendants] alleged that Pang offered to recant his allegations if [Defendants] would pay him $20,000. Notwithstanding [Defendants'] allegation, Pang testified that he had never met with, or communicated with, any of [Defendants'] associates, and never accepted any bribe money. The Court finds that [Defendants'] allegation that Pang attempted to solicit money in exchange for his recantation to be incredible and unworthy of belief.
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> . . . .
>
> 56. [Defendants] claim that they are entitled to a new trial based on "newly discovered evidence". Notwithstanding [Defendants'] claim, the Court finds that the evidence cited by [Defendants] does not constitute "newly discovered evidence." See State v. McNulty, 60 Hawai'i [sic] 259, 588 P.2d 438 (1979).

[7] The Honorable I. Norman Lewis presided.

The circuit court concluded, based on its findings of fact, that Defendants failed to satisfy the four-part test under McNulty, 60 Haw. at 267-68, 588 P.2d at 445, to qualify for a new trial based on newly discovered evidence.

Meanwhile, on October 23, 2001, the circuit court entered a judgment that convicted Wilderman of Robbery in the First Degree and sentenced him to serve an indeterminate twenty-year term of incarceration, with a mandatory minimum term of six years and eight months as a repeat offender and a mandatory term of ten years for the use of a firearm in the commission of a felony. The judgment also required that Wilderman's term of incarceration "be served consecutively to the sentences imposed in CR. 94-1657, CR. 94-1932 and CR. 95-0192 and shall be with credit for time served."

On November 21, 2001, Wilderman filed a notice of appeal. Wilderman's appeal was consolidated with the appeal of Scanlan, who was also convicted. In his appeal, Wilderman raised three points of error:

(1) "'[T]he prosecution violated his due process rights under Brady v. Maryland, 373 U.S. 83 (1963), because it failed to release exculpatory evidence to him until the middle of trial[;]'" State v. Wilderman, No. 24705 (Haw. App. Oct. 29, 2003) (ICA Opinion at 33);

(2) "[T]he court erred in denying his motion for new trial[,]" id. at 36; and

(3) "[T]he court abused its discretion in sentencing him to consecutive terms of imprisonment at the same time it denied the State's motion for an extended term of imprisonment." Id. at 37-38 (footnotes omitted).

On October 29, 2003, this court issued the ICA Opinion that affirmed the judgments convicting and sentencing Defendants.

On December 15, 2003, Wilderman applied for a writ of certiorari to the Hawai'i Supreme Court, which initially granted the application but subsequently dismissed the application as improvidently granted. A notice and judgment on appeal was entered on January 13, 2004.

On February 27, 2004, Wilderman filed a motion for reconsideration of sentence. On March 29, 2004, following a March 19, 2004 hearing on the motion, the circuit court issued an order denying the motion.

B.

On February 4, 2004, Wilderman filed the Rule 40 Petition that underlies this appeal. Wilderman sought relief from the judgment of conviction and sentence entered against him on October 23, 2001 on two grounds:

> A. Ground one: There is newly discovered evidence which would entitle me to a new trial under Rule 40(a)(1)(iv).
>
> . . . I found out after my attorney had already filed the notice of appeal that an individual named Gary Acopian [(Acopian)] unduly influenced two of the witnesses. The two witnesses that testified that I was the individual who committed the crime were [Pang] and [Taylor]. I knew prior to the notice of appeal being filed that [Acopian] was having a relationship with my wife and that he wanted to see me go to jail so that he could be with my wife. I did not find out until after I filed the notice of appeal that [Pang] and [Taylor] worked for [Acopian] in an illegal business. I believe that I have a witness who will substantiate that Pang and Taylor worked for Acopian. I believe that Acopian had Pang and Taylor testify in a certain manner so that I would go to jail and that he could have a relationship with my wife.
>
> B. Ground two: [Taylor's] testimony identifying me as the individual involved was affected by his seeing my picture in the Pearl City police station.
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> . . . [Taylor] testified at the trial in this matter that he saw my picture in the Pearl City police station just prior to seeing a photo lineup in which he identified me as the person who committed the crime. This was not disclosed to me or my counsel before the trial. I believe that seeing this photograph tainted [Taylor's] testimony.

On October 28, 2004, the circuit court entered the Order that denied Wilderman's Rule 40 Petition without a hearing. In the Order, the circuit court entered numerous findings of fact, among them the following:

> 7. On August 16, 2001, [Wilderman] filed a Motion for New Trial and a Motion for Judgment of Acquittal After Discharge of Jury. One issue raised in the motion for new trial was Taylor's view of [Wilderman's] photograph at the Pearl City police station prior to the identification of [Wilderman] through the photographic line-up. Another issue raised in the motions was the testimony of [Apao] regarding evidence of conduct by [Acopian] regarding witnesses in the trial.
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> . . . .
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> 11. On November 21, 2001 [Wilderman] filed a Notice of Appeal in Cr. No. 01-1-0422. The issues presented on appeal included the denial of the motions for new trial and judgment of acquittal, the newly discovered evidence regarding [Acopian], and Taylor's identification of [Wilderman]. On October 29, 2003 the Intermediate Court of Appeals of the State of Hawaiʻi issued a Memorandum Opinion affirming the judgment of the Court. The Judgment on Appeal was filed on January 14, 2004.

The circuit court also entered conclusions of law that included the following:

> 6. A review of Ground One of [Wilderman's] Petition shows that [Wilderman] is not entitled to relief because this issue was raised and ruled upon at [Wilderman's] Motion for New Trial and on appeal. Further, [Wilderman] has not shown that the newly discovered evidence [Wilderman] refers to could not have been discovered through due diligence. Moreover, [Wilderman] has not set forth exactly how Acopian influenced the testimony at trial and has failed to show that this evidence is not only for purposes of impeachment.
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> . . . .
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> 8. A review of Ground Two of [Wilderman's] Petition shows that [Wilderman] is not entitled to relief because this issue of Taylor's identification of [Wilderman] was previously raised and ruled upon. In addition, the trial court found Taylor's identification of [Wilderman] to be reliable. Taylor had ample opportunity to view [Wilderman] during the incident as he was seated in the front passenger seat of Pang's vehicle. Taylor had his full attention on [Wilderman], especially after [Wilderman] approached the vehicle and pointed a gun in Taylor's direction. Taylor was able to set forth a detailed description of [Wilderman]. When shown the photographic line-up, Taylor positively identified [Wilderman] as the gunman. Taylor identified

> [Wilderman] from the photographic line-up approximately fifteen (15) days after the incident.

Wilderman now asserts that the circuit court reversibly erred when it denied his Rule 40 Petition without a hearing because he presented a colorable claim of newly discovered evidence that warranted a hearing. Wilderman also maintains that the circuit court clearly erred when it entered findings of fact Nos. 7 and 11 and conclusion of law No. 6 in denying his Rule 40 Petition because, contrary to the circuit court's findings and conclusion, "the record below is 'bereft' of any support for the [circuit] court's findings that the issue in Ground One had been raised and ruled upon at [Wilderman's] Motion for New Trial, his Motion for Judgment of Acquittal after the Verdict and on appeal." Opening Brief at 14.

We disagree with Wilderman.

C.

HRPP Rule 40(a) provides, in relevant part, as follows:

> **POST-CONVICTION PROCEEDING.**
>
> **(a) Proceedings and grounds.** The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:
>
> (1) FROM JUDGMENT. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:
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> . . . .
>
> (iv) that there is newly discovered evidence[.]
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> . . . .
>
> (3) INAPPLICABILITY. 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.

(Emphasis added.) In Stanley v. State, 76 Hawai'i 446, 450, 879 P.2d 551, 555 (1994), the Hawai'i Supreme Court noted that

> HRPP Rule 40(a)(3) restricts the issues that may be raised in a post-conviction proceeding and provides in pertinent part that "said proceeding 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."

(Brackets omitted.)

Our review of the record on appeal confirms the correctness of the circuit court's determination that the issues raised by Wilderman in his Rule 40 Petition were previously raised by Wilderman in his August 16, 2001 motion for new trial and his prior appeal.

D.

As to Ground One of Wilderman's Rule 40 Petition, our review of the transcripts of the hearing on Wilderman's motion for new trial clearly indicates that the primary focus of the hearing revolved around "newly discovered evidence," specifically testimony by Apao that he had been approached by Acopian, who had offered to drop the charges against Wilderman if Apao came up with $20,000 for Pang. Moreover, Wilderman appealed the circuit court's order denying his motion for new trial, and by a Memorandum Opinion, this court affirmed the circuit court's order. ICA Opinion at 36.

In our opinion, this court addressed the basis of newly discovered evidence for Wilderman's motion for new trial as follows:

> Wilderman next contends the court erred in denying his motion for new trial. On this point, Wilderman first argues that Pang's offer to Apao -- to "drop" the case against

> Wilderman for $20,000.00 -- "reflects his willingness to sell out to the highest bidder and to alter his testimony." Wilderman presents this issue as one of "newly discovered evidence" because Apao did not come forward with his accusation until after trial.
>
> However, the court found, after an evidentiary hearing on Wilderman's motion for new trial in which Pang and Apao testified, that "the defendant's (sic) allegation that Pang attempted to solicit money in exchange for his recantation is incredible and unworthy of belief." Accepting the court's judgment on the credibility of the witnesses and the weight of evidence, Eastman, 81 Hawai'i at 139, 913 P.2d at 65, we conclude that this was not an instance of newly-discovered [sic] evidence justifying a grant of Wilderman's motion for new trial, but instead, an instance of newly-fabricated [sic] evidence justifying a denial.

Id. at 36 (footnote and brackets omitted).

We also observe that the statement by Wilderman in support of Ground One is essentially an uncorroborated speculative claim of what he "believes" an undisclosed witness might testify to at a hearing on the Rule 40 Petition. With respect to Rule 40 petitions for post-conviction relief that are premised on a claim of ineffective assistance of counsel due to failure to obtain particular witnesses, the Hawai'i Supreme Court has held that such uncorroborated speculative claims are insufficient to meet a petitioner's burden of proving that trial counsel's failure to subpoena the putative witness constitutes constitutionally ineffective assistance of counsel. State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218, 1230 (1994), overruled on other grounds by State v. Balanza, 93 Hawai'i 279, 288, 1 P.3d 281, 290 (2000). See also State v. Fukusaku, 85 Hawai'i 462, 481, 946 P.2d 32, 51 (1997). The same principle applies here.

E.

The record on appeal also indicates that Ground Two of Wilderman's Rule 40 Petition was clearly raised and ruled upon by the circuit court when it entered the order denying Wilderman's motion for new trial. In that order, the circuit court entered the following findings of fact:

Alleged Observation Of Wilderman's Photo On The Wall

61. The defendants also allege that Taylor's inadvertent observation of Wilderman's photograph at the Pearl City police station constitutes "newly discovered evidence".

62. The Court finds, however, that: (1) Taylor testified to this incident during Scanlan's preliminary hearing, (2) Scanlan's preliminary hearing transcript was a "public record" and was available to all parties after Wilderman's and Scanlan's trials were consolidated on April 12, 2001, and (3) the defendants had a duty to exercise "due diligence" and to show that they took affirmative steps to obtain Scanlan's preliminary hearing transcript but, that for some valid reason, it could not be discovered prior to trial. State v. McNulty, supra.

. . . .

66. Both Taylor and Pang testified at Scanlan's preliminary hearing. . . . Scanlan's attorney ordered and received a copy of the preliminary hearing transcript several months prior to trial. The prosecution ordered and received a copy of the preliminary hearing transcript on April 16, 2001. Wilderman could have ordered and received a copy of the preliminary hearing transcript prior to trial.

67. Wilderman had a duty to "exercise due diligence". State v. McNulty, supra. Wilderman had a duty to take affirmative steps to discover, order, and receive a copy of the preliminary hearing transcript prior to trial so that it could be used to impeach prosecution witnesses Pang and Taylor (should the opportunity arise).

68. If Wilderman had "exercised due diligence", as McNulty requires and as Scanlan and the prosecution did, he would have discovered Taylor's reference to seeing Wilderman's photograph on the wall at the Pearl City police station prior to trial.

69. The Court finds that Taylor's observation of Wilderman's photograph on the wall at the Pearl City police station was "not a fact that was in existence but hidden" from Wilderman. State v. Faulkner, 1 Haw. App. at 657. (emphasis added).

70. It was a fact that was in existence and revealed prior to trial during an open, public hearing, and that was available to all parties, including Wilderman, who wished to have a copy of the preliminary hearing transcript for impeachment purposes at trial. Thus, the Court finds that the defendants have failed to demonstrate that Taylor's observation could not have been discovered at or before trial "through the exercise of due diligence". State v. McNulty, supra.

> 71. The Court further finds that the defendants have failed to demonstrate that Taylor's observation of Wilderman's photograph would be offered for anything other than "mere impeachment evidence", i.e., impeachment of Taylor's positive in-court identification of Wilderman as the gunman. State v. McNulty, supra. The Court notes that, during the hearing on the defendant's motion for new trial, Taylor reiterated that he was "positive" of his identification of Wilderman as the gunman in the robbery.

Wilderman's arguments regarding Ground Two of his Rule 40 Petition are thus without merit.

F.

In light of the foregoing discussion, we affirm the Findings of Fact, Conclusions of Law, and Order entered by the circuit court on October 28, 2004.

DATED: Honolulu, Hawai'i, January 31, 2008.

On the briefs:

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