

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28065

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

EDISON BARIT LAMEG, Petitioner-Appellant,  
v.  
STATE OF HAWAII, Respondent-Appellee

EMERIL RIZANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(S.P.P. NO. 06-1-0018 (Cr. No. 01-1-2241))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Edison Barit Lameg (Lameg), pro se, appeals from the "Order Denying Petition for Post-Conviction Relief, Filed March 21, 2006" (Order) filed on June 30, 2006 in the Circuit Court of the First Circuit<sup>1</sup> (circuit court). Lameg filed his Petition for Post-Conviction Relief (Rule 40 Petition) on March 21, 2006, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

**A. Prior Proceedings**

In the underlying criminal case (Cr. No. 01-1-2241), the State of Hawai'i (State) charged Lameg with two counts of Sexual Assault in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(c) (Supp. 2001). Lameg was represented at pretrial proceedings and trial by Jonathan Burge. Lameg filed a Motion to Suppress Statements on July 3, 2002. The motion was denied by order filed on September 24, 2002.

A jury found Lameg guilty as charged. The circuit court sentenced Lameg to twenty years of incarceration on each of the two counts, the sentences to be served concurrently, and filed the Judgment on May 19, 2003.

**B. Lameg's Direct Appeal**

On June 18, 2003, Lameg filed an appeal (Direct Appeal) from the Judgment. Lameg was represented on Direct Appeal in

<sup>1</sup> The Honorable Richard W. Pollack presided.

S. Ct. 25896 by Karen T. Nakasone and Edward K. Harada, Deputy Public Defenders. Lameg contended that the circuit court erred

(1) in denying his Motion to Suppress Statements by concluding that he voluntarily, intelligently, and knowingly waived his right to counsel prior to the commencement of custodial interrogation;

(2) in instructing the jury, over Lameg's objection, that "'[f]ellatio' means a sexual act in which the mouth or lips come into contact with the penis" on the ground that, with respect to Count I, the instruction did not require the State to prove sexual penetration; and

(3) in failing to issue sua sponte a limiting instruction to the jury that because the State failed to satisfy the requirements of Hawaii Rules of Evidence (HRE) Rules 802.1(1) (1993) and 613(b) (1993), the complainant's prior inconsistent statement could not be considered substantively.

The Hawai'i Supreme Court affirmed the Judgment.

**C. Lameg's First Petition**

On January 27, 2005, Lameg filed his first Petition for Post-Conviction Relief, S.P.P. No. 05-1-0010 (First Petition), in which Lameg raised the following issues:

(1) His conviction was based on a coerced confession.

(2) His conviction was based on an illegal arrest resulting in a coerced confession, which he was forced to make without a lawyer.

(3) His conviction was based upon a confession obtained in violation of his right against self-incrimination.

(4) He was already involved in a relationship with the victim prior to the change in the law and therefore his relationship should have been allowed to continue.

The State opposed the First Petition. The circuit court denied the First Petition by "Order Denying Petition for Post-Conviction Relief, Filed on January 27, 2005," filed on June 28, 2005. Lameg did not appeal.

**D. Lameg's Second Petition**

On November 1, 2005, Lameg filed a second Petition for Post-Conviction Relief, S.P.P. No. 05-1-0073 (Second Petition), in which he raised the following issues:

(1) He received ineffective assistance of counsel due to trial counsel's failure to suppress evidence of his coerced confession and trial counsel's failure to allow Lameg to remain silent at trial.

(2) He was denied access to the courts because he was unable to obtain the assistance of fellow inmate jailhouse lawyers and he was not appointed counsel.

The State opposed the Second Petition. On December 13, 2005, the circuit court filed its "Order Denying Ground One of the Petition for Post-Conviction Relief, Filed November 1, 2005, and Directing that Ground Two of the Petition for Post-Conviction Relief, Filed November 1, 2005, Be Forwarded to the Clerk of the First Circuit Court to Be Processed as a Civil Proceeding." Lameg did not appeal from the order.

**E. Rule 40 Petition**

On March 21, 2006, Lameg filed his Rule 40 Petition, in which he contended:

(1) His conviction was obtained in violation of his right against self-incrimination because the State introduced at trial a statement of Lameg that had been wrongfully obtained by the police in the absence of counsel when he had asked for counsel.

(2) His conviction was based on a coerced confession.

(3) The police illegally searched his vehicle and home.

(4) His right to remain silent was violated when his attorney compelled him to testify.

Lameg attached to his petition an undated and unsigned letter purporting to be from the victim that stated in part:

"About the one in the pick up it wasn't true, like what I said in my statement we was changing in the truck we wasn't having sex."

The State opposed the Rule 40 Petition.

On June 30, 2006, the circuit court filed an "Order Denying Petition for Post-Conviction Relief, Filed March 21, 2006," holding that:

(1) Lameg's claim that his privilege against self-incrimination had been violated because the State introduced at trial his statement that had been wrongfully obtained by the police in the absence of counsel when he had asked for counsel had been previously raised in his Motion to Suppress, on Direct Appeal, and in the First Petition.

(2) Lameg's claim that his conviction was based on a coerced confession had been raised in the First Petition.

(3) Lameg's claim that the police illegally searched his vehicle and home could have been raised in the First Petition and Lameg has not demonstrated extraordinary circumstances that would justify his failure to raise this issue in his First Petition.

(4) Lameg's allegation that his attorney forced him to testify amounts to a claim of ineffective assistance of counsel, which could have been, but was not, raised in the First Petition. This claim was raised and denied in his Second Petition for not having been raised in his First Petition. Lameg has not demonstrated extraordinary circumstances that would justify his failure to raise this issue in his First Petition.

Lameg timely filed a notice of appeal.

**F. The Present Appeal**

On appeal, Lameg contends:

(1) His conviction was based upon an illegally obtained confession.

(a) He had requested an attorney.

(b) He was threatened by the interrogating officer.

(c) He was isolated during interrogation.

(d) His statement was not voluntary.

(e) The circuit court erred in denying the motion to suppress statements.

(2) He did not want to testify at trial and did so only because his attorney told him he had to testify.

(3) The victim recanted.

(4) His conviction was based upon an illegal search of his vehicle and house.

(5) He had ineffective assistance of counsel on his Direct Appeal because his appellate counsel failed to raise these issues.

**1. Lameg's conviction was based upon an illegally obtained confession.**

HRPP Rule 40(a)(3) provides that "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." The legality of the State's use of Lameg's confession was raised and ruled upon in the Motion to Suppress Statements, the First Appeal, the First Petition, and the Second Petition (in the guise of an ineffective assistance of counsel claim). Since there was no appeal from the Second Petition, Lameg waived any claim that the State's use of the confession was flawed but unchallenged because of ineffective assistance of counsel.

**2. Lameg did not want to testify at trial and did so only because his attorney told him he had to testify.**

This issue was raised and previously ruled upon in the Second Petition. See HRPP Rule 40(a)(3).

**3. The victim recanted.**

This issue was not raised in the circuit court and was therefore waived. "As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil

cases." State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003).

The victim's recantation of her statement to the police is not new. She testified at trial that on October 6, 2001, she was with Defendant at the beach and they were just changing clothes in the truck. She testified that her statement to the police was false and she made the statement because she was scared.

**4. His conviction was based upon an illegal search of his house and vehicle.**

Lameg did not raise the issue of an illegal search of his house and vehicle in a pre-trial motion. HRPP Rule 12(b) identifies a motion to suppress evidence as one of the motions that "must be raised prior to trial." Lameg also did not raise this issue when he made his claim of ineffective assistance of counsel in the Second Petition. Lameg's failure to raise these issues prior to trial, at trial, in the First Petition, or in the Second Petition gives rise to a presumption that Lameg knowingly and understandingly did not raise the issues. HRPP Rule 40(a)(3). Lameg has not asserted the existence of extraordinary circumstances to justify his failure to raise these issues previously. Id.; see also Stanley v. State, 76 Hawai'i 446, 450-51, 879 P.2d 551, 555-56 (1994).

**5. Ineffective assistance of counsel on appeal for failing to raise these issues on appeal.**

This issue was not raised in the First Petition or the Second Petition and was therefore waived. In his Opening Brief, Lameg states that he asked his appellate counsel to add the issues he is raising in the instant appeal when counsel filed his Direct Appeal, but counsel failed to do so. However, based on this assertion, it appears that Lameg was aware of the issue of ineffective assistance of appellate counsel prior to the filing of the First Petition and the Second Petition.

Ineffective assistance of his counsel in his Direct Appeal is raised for the first time in this appeal. "As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases." Moses, 102 Hawai'i at 456, 77 P.3d at 947.

Even if the issue had not been waived, Lameg failed to demonstrate a colorable claim of ineffective assistance of counsel on appeal. The criteria for a claim of ineffective assistance of counsel is whether counsel's performance was "within the range of competence demanded of attorneys in criminal cases." Briones v. State, 74 Haw. 442, 462, 848 P.2d 966, 976 (1993) (internal quotation marks and citation omitted). Under this criteria, Lameg is required to show "specific errors or omissions . . . reflecting counsel's lack of skill, judgment, or diligence[,]" and that "these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." Id. at 462, 848 P.2d at 976 (internal quotation marks and citation omitted). Lameg has alleged errors and omissions, but has failed to show how they resulted in a substantial impairment of a potentially meritorious defense.

Therefore,

The "Order Denying Petition for Post-Conviction Relief, Filed March 21, 2006" filed on June 30, 2006 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 24, 2008.

On the briefs:

Edison Barit Lameg,  
Petitioner-Appellant pro se.

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



Chief Judge



Associate Judge



Associate Judge