

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28253

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIIDAT MINH TRAN, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-AppelleeNORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 05-1-0059 (Cr. No. 95-2471))SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Dat Minh Tran (Tran) challenges the Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or Correct Judgment and Release from Illegal Custody Through a Writ of Habeas Corpus (FOF/COL/Order) filed on October 17, 2006 in the Circuit Court of the First Circuit (circuit court).¹ The circuit court denied Tran's "Petition to Vacate, Set, Aside, or Correct Judgment and Release Petitioner from Illegal Custody Through a Writ of Habeas Corpus Pursuant to [Hawaii Rules of Penal Procedure (HRPP)] Rule 40" (Third Petition) without a hearing.

A jury convicted Tran of Attempted Murder in the First Degree (Count I) and Place to Keep Loaded Firearm (Count V). The circuit court sentenced Tran to life without the possibility of parole on Count I and ten years of imprisonment with a mandatory minimum of ten years on Count V and entered the Judgment on October 14, 1997.

In the direct appeal of his conviction, Tran contended:

(1) The jury instruction given by the circuit court regarding defense of others was erroneous.

(2) The circuit court failed to (a) instruct the jury on the defense of extreme mental or emotional disturbance (EMED)

¹ The Honorable Michael D. Wilson presided.

manslaughter; (b) conduct a colloquy with Tran regarding included offenses for Attempted Murder in the First Degree; (c) give jury instructions on included offenses for Attempted First Degree Murder; (d) instruct the jury on the included offense of Second Degree Reckless Endangering; (e) instruct the jury that as to the attempted-first-degree-murder count, it must enter a unanimous verdict regarding the conduct that constituted "a substantial step" for each attempted offense and the persons whom Tran intended to kill; and (f) specify in the given jury instructions the conduct which constituted "a substantial step" or the persons Tran intended to kill (attempted-first-degree-murder count) to commit the attempted offenses.

(3) Tran's defense counsel supplied ineffective assistance of counsel because (a) counsel failed to request a jury instruction on the defense of EMED manslaughter; (b) the circuit court did not conduct a colloquy with Tran regarding included offenses for Attempted Murder in the First Degree; (c) the circuit court failed to tender included offenses for Attempted First Degree Murder; and (d) the circuit court failed to instruct the jury that it must enter a unanimous verdict regarding the conduct that constituted "a substantial step" for each attempted offense and the persons whom Tran intended to kill to convict him of the attempted-first-degree-murder count.

(4) The circuit court erred when it (a) failed to give Tran's jury instructions for the attempted-murder charges, which added a third element, i.e., that Tran "intended to cause the death" of each victim or "more than one person"; (b) added the words "or known" to the second element of each attempted-murder jury instruction; (c) added the words "or known" to the attempted-first and second-degree-assault instructions and failed to include elements requiring an intent to assault; and (d) allowed the State to accuse Tran of a subsequent place-to-keep violation, as well as driving around in a car with a loaded gun on October 21, 1995.

(5) The circuit court committed plain error when it allowed the State to accuse Tran of stealing in 1991 the gun he fired in Waikiki in 1995.

(6) Tran's counsel was ineffective for failing to object to the error set forth in (5).

(7) The circuit court erred by sentencing Tran to a mandatory minimum term of imprisonment on Count V.

(8) There was insufficient evidence to convict Tran.

On October 6, 1998, in a Summary Disposition Order in No. 21118, the Hawai'i Supreme Court affirmed Tran's conviction.

On May 4, 2000, Tran filed a Petition for Post-Conviction Relief (First Petition) in S.P.P. No. 00-1-0020, in which Tran claimed:

(1) He was denied effective assistance of counsel because his trial counsel (a) failed to call witnesses Annie Lee and Ho Lee to testify as to his state of mind at the time the shots were fired; (b) should have had a neurological examination of Tran completed prior to trial; (c) should have called character witnesses to show that Tran did not "go around looking for trouble"; and (d) did not inform Tran of the possibility of entering into a plea agreement on a reduced charge to eliminate the sentence of life without possibility of parole.

(2) The circuit court erred in (a) not instructing the jury on attempted EMED manslaughter; (b) not instructing the jury on second-degree reckless endangering as an included offense of second-degree murder; (c) not giving a jury instruction on the defense of protection of others; (d) not granting his motion for judgment of acquittal after discharge of the jury or for new trial due to newly discovered evidence of trauma to his head; (e) trying him as an adult; and (f) not instructing the jury on attempted assault with a deadly weapon.

(3) His trial and appellate counsel were ineffective for failing to raise issues 1 and 2 above.

On April 23, 2003, the circuit court issued its Findings of Fact, Conclusions of Law, and Order Denying Petition for Post-Conviction Relief, which denied Tran's First Petition in its entirety without a hearing.

On November 21, 2003, Tran filed a second Petition for Post-Conviction Relief (Second Petition) in S.P.P. 03-1-0052, in which he claimed:

(1) He received ineffective assistance of trial counsel because his counsel (a) denied him the right to a speedy trial; (b) coerced him into agreeing to the Stipulation² when he did not understand the nature of the charge or the consequence of the Stipulation; (c) forced him to testify at trial and to sign

² The Stipulation provided:

IT IS HEREBY STIPULATED AND AGREED by and between the State of Hawaii, by and through VICTOR J. BAKKE, Deputy Prosecuting Attorney, City and County of Honolulu, State of Hawaii, and DAT MINH TRAN, Defendant, by and through his attorney, Chester Kanai, that the following facts are true and accurate and will be admitted into evidence in lieu of other evidence or testimony:

1. That on the evening of Saturday, October 7, 1995, Dat Minh Tran did fire a 9mm semi-automatic Beretta firearm, model 92FS, serial no. L10521Z, near the intersection of Kuhio Avenue and Kapuni Street in Waikiki.

2. That shortly after the shooting, Officer Michael Hunt of the Honolulu Police Department recovered two (2) 9mm shell casings from the roadway near the intersection of Kuhio Avenue and Kapuni Street. Said casings were placed into evidence and submitted for testing.

3. That on October 8, 1995, one (1) bullet and one (1) bullet fragment were recovered from the truck of Joseph Ornellas. Said items were placed into evidence and submitted for testing.

4. That on October 12, 1995, Christopher Kaneshiro identified Dat Minh Tran as the individual who shot him on the evening of Saturday, October 7, 1995.

5. Dat Minh Tran was arrested on October 21, 1995. At the time of his arrest, police recovered a 9mm semi-automatic Beretta firearm, model 92FS, serial no. L10521Z.

6. On October 26, 1995, Honolulu Police Department Officer Curtis Kubo, who is an expert in the area of firearms and ballistics, compared the recovered fragments and casings with Defendant's 9mm semi-automatic Beretta firearm, model 92FS, serial no. L10521Z and concluded that the gun was operational and that said items were all fired from said gun.

the Stipulation, thereby waiving his right against self-incrimination; (d) coerced him into waiving without knowledge and understanding his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights by signing the Stipulation; and (e) prejudiced and tainted his trial by tricking, deceiving, and coercing him into agreeing and signing the Stipulation.

(2) The trial judge prejudiced and tainted his trial by holding a chambers conference before opening statements, the subject of which was to "get [Tran] to agree and sign" the Stipulation.

(3) The prosecutor prejudiced and tainted his trial by reading the Stipulation to the jury and then reminding the jury of it several times.

(4) The judge, prosecutor, and his defense counsel prejudiced and tainted his trial because the judge dismissed all jurors except one; the parties questioned the juror; the juror was biased against Tran because Tran lived in Palolo Housing; his counsel did not move to dismiss or strike this juror for cause; the prosecutor did not move to dismiss or strike this juror for cause; and the judge allowed the juror to stay on the jury.

On January 27, 2005, the circuit court issued its Findings of Fact, Conclusions of Law, and Order Dismissing Petition for Post-Conviction Relief Without A Hearing, which denied Tran's Second Petition in its entirety. Tran's appeal of the denial of his Second Petition was dismissed by the Hawai'i Supreme Court in No. 27166 for lack of appellate jurisdiction.

In his Third Petition and February 13, 2006 Motion to Clarify Petition, Tran alleged:

1. His trial counsel provided ineffective assistance when counsel did not have Tran complete a pre-trial neuropsychological exam (neuropsych exam) to assess Tran's competence to stand trial.

2. His trial counsel provided ineffective assistance because counsel did not protect Tran's right to due process by

ensuring that Tran's waiver of rights to challenge the evidence against him as set forth in the Stipulation was knowing, intelligent, and voluntary.

3. Trial counsel provided ineffective assistance by failing to ensure that the court-ordered interpreter was present during counsel's morning consultation with Tran regarding the Stipulation and during counsel's review of the written Stipulation with Tran at the lunch recess.

4. He did not make a knowing and intelligent waiver of his constitutional rights when he agreed to the Stipulation because there was no interpreter present when counsel reviewed the Stipulation with him early in the morning or at the lunch recess prior to the start of trial.

5. He was denied due process when his counsel told him to agree to every question asked by the judge regarding the waiver of his constitutional rights and the Stipulation.

6. He did not have the cognitive ability to make a knowing, intelligent, and voluntary waiver of his rights to challenge witnesses and evidence against him and to challenge the Stipulation because his intellectual comprehension was borderline.

7. His trial counsel provided ineffective assistance when counsel failed to file any motions challenging Tran's competence to stand trial or make a knowing, intelligent, and voluntary waiver of his constitutional rights after the results of the post-conviction, presentence neuropsych exam were received in evidence.

8. His trial counsel's ineffectiveness resulted in the withdrawal or substantial impairment of the following meritorious defenses because, but for such ineffectiveness:

(a) Tran would not have waived his constitutional right to challenge

(i) the evidence that the gun recovered in a later arrest was the gun used in the instant offense;

(ii) Tran was the person who shot at and hit the vehicle and victim inside the vehicle;

(iii) the bullet fragments recovered from the scene and the victim's vehicle were from the gun in (i) above.

(b) Tran would not have made any waivers or agreed to the Stipulation if he had not believed that the charges would be reduced to reckless endangering.

(c) Tran might not have testified if he had known that he was still facing Attempted Murder in the First Degree charges.

9. The circuit court erred when it did not ensure that Tran's waiver as to the Stipulation was knowing, intelligent and voluntary by asking him during the colloquy if anyone had promised him anything "in exchange for these waivers and stipulations."

10. He was never given the opportunity to understand his rights because of miscommunications, bad timing, a language barrier, or all three, and therefore his waiver as to the Stipulation was not knowing, intelligent, and voluntary because he believed he was making the waiver in exchange for an included offense of reckless endangering and other promises.

11. He waived his rights because he was threatened that unless he made the waiver and Stipulation, his trial could not continue, he could not testify at trial, and he could not raise a self-defense defense.

12. He waived his rights because he believed the State promised to reduce the charges to reckless endangering, not put into evidence his other arrests or juvenile record, and allow him to raise a self-defense defense.

13. His unknowing, unintelligent, and involuntary agreement to the Stipulation was analogous to a coerced confession.

14. To prevent manifest injustice, the Stipulation should be set aside because it was overwhelmingly beneficial to

the State and the State reneged on the promises it made to him to induce him to agree to the Stipulation.

15. The Stipulation should be set aside (a) because it was made upon fraud, collusion, mistake, accident, surprise, or oppression; he inadvertently, unadvisedly, or improvidently agreed to it; and it operated inequitably and prejudiced him; (b) to prevent manifest injustice; and (c) to return all parties to the condition in which they were before the Stipulation was made.

16. The State had the burden of ensuring that his waiver was voluntary, knowing, and intelligent.

17. His waiver of his constitutional rights and his agreement to the Stipulation were not free from brow-beating, intimidation, and undue pressure.

18. As evidenced by the post-conviction, presentence neuropsych exam, he was incapable of waiving his constitutional rights and entering into the Stipulation by reason of age, ignorance, or mental capacity; was unable to assist his trial counsel with or make decisions regarding his defense; and did not have the knowledge or mental capacity to make cognizant decisions or adequately represent himself.

19. His trial counsel provided ineffective assistance when counsel failed to raise any other defense, theory, or theories after preserving that right on the record and without consulting Tran.

20. His trial counsel provided ineffective assistance when counsel told Tran that: Tran's charges would be dropped to reckless endangering if Tran waived his rights and agreed to the Stipulation; the State would not adduce evidence of Tran's other arrests and juvenile record; and Tran's waiver was the only way that trial could continue, Tran could raise the self-defense defense, or Tran could explain his state of mind and intent during the incident.

21. The circuit court erred by denying Tran due process when it failed to ascertain that his waiver of his constitutional rights was voluntary, knowing, and intelligent.

22. The circuit court reversibly erred when it failed to determine that Tran's waiver was voluntary, knowing, and intelligent and not a consequence of a previous threat or promise by a person who may be supposed to have some authority or influence.

23. The circuit court committed reversible error when it (a) denied Tran due process by failing to hold a colloquy with him regarding the waiver of his constitutional rights when he returned to court after the court-ordered review of the Stipulation with his counsel during the lunch recess; (b) made no attempt to ascertain that the Stipulation reflected Tran's understanding; and (c) took no action to make sure the Stipulation was accurate.

24. The circuit court erred in not declaring a mistrial when the State violated the agreement between the parties by raising in its opening statement and throughout trial Tran's other arrests, juvenile record, statements made to Officer Nakama outside a 711 store, and a subsequent drive-by shooting on Ahe Street, which agreement was relied upon by Tran when he waived his rights and agreed to the Stipulation.

25. Tran received ineffective assistance of counsel when his trial counsel failed to file a motion for mistrial, for directed verdict, or to set aside the verdict, or for any other action challenging Tran's conviction upon receipt of the results of the court-ordered neuropsych exam.

26. The circuit court erred after receiving the results of the neuropsych exam by not (a) ordering an investigation into Tran's competence to stand trial, waive his constitutional rights, enter into the Stipulation, assist with his defense, and make decisions regarding his defense and (b) recognizing trial counsel's ineffective assistance to Tran.

27. Tran's appellate counsel was ineffective because counsel failed to discuss Tran's medical history with Tran and investigate Tran's competence; chose to ignore Tran's claims that Tran's trial counsel, the State, and the trial judge conspired to get Tran to waive his rights and enter into the Stipulation; ignored or failed to discern that the circuit court in its colloquy with Tran failed to ask Tran if anyone had promised him anything in exchange for his waiver; ignored or failed to discern that the circuit court did not hold a colloquy with Tran regarding his waiver after Tran had reviewed the written Stipulation with his counsel at the lunch recess; ignored or failed to discern the defect in the circuit court's colloquy with Tran, in which the court asked Tran if he was agreeing to give up his right to hear and question witnesses and had again discussed this with his counsel; ignored or failed to investigate why trial counsel failed to raise any additional defenses on behalf of Tran; ignored or failed to investigate whether Tran was competent to stand trial, make waivers, or stipulations; failed to raise allegations of ineffective assistance of trial counsel made by Tran or indicated by facts contained in the trial record or other supplemental document and evidence in addition to those allegations contained in the direct appeal.

28. Tran was denied effective assistance because trial counsel failed to investigate whether one complainant, Christopher Kaneshiro, was related to Keith Kaneshiro (the Prosecuting Attorney for the City and County of Honolulu) and if so, whether Tran was overcharged in the original complaint -- all of which would have enabled Tran to raise a defense of prosecutorial misconduct and obtain a reduction of the charges against him.

29. Tran was denied due process under the state and federal constitutions when the State failed to include in Tran's indictment the State's intention to pursue a sentencing enhancement of extended and/or consecutive terms.

30. The violations of Tran's constitutional rights warrant relief as structural error, but even if such violations were not structural error, such violations were not harmless.

On October 17, 2006, the circuit court, without holding a hearing, entered its FOF/COL/Order.

On appeal from the denial of his Third Petition, Tran contends:

(1) The circuit court erred "by holding that a 'knowing and understanding waiver' is one where [Tran] has 'failed to demonstrate that the written stipulation . . . varied from the oral stipulation made in court.'"

(2) The circuit court erred "in holding that the court's review was limited to evidence in the record despite the fact that [Tran] brought a petition for a writ of habeas corpus pursuant to HRPP Rule 40, and the [c]ircuit [c]ourt disregarded all evidence provided by [Tran] through third-party declarations, personal declarations and other exhibits."

(3) He "had a right to a translator during every stage of the proceeding preceding his waiver of known rights through the [S]tipulation" prior to the circuit court's colloquy.

(4) The circuit court "erred by misapplying state and federal law regarding the 'totality of the facts and circumstances' test" and did not take into account his background, experience, and conduct in determining if his waiver was valid, knowing, or intelligent.

(5) He "had a right to a full and complete colloquy" with the circuit court "after the stipulations were put in writing and [he] was afforded an[] opportunity to review said stipulations with [t]rial [c]ounsel with an interpreter present."

(6) He had "a right to effective assistance of counsel including a neurological examination prior to trial."

(7) He had "a due process right to page 19" of the circuit court's FOF/COL/Order denying his petition for a writ of habeas corpus.

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 resolve Tran's points of error as follows:

In Tran's first point of error, he claims the circuit court "erred in its [COL] number six when it misapplied present law," and he argues that the actual standard as determined in Reponte v. State, 57 Haw. 354, 556 P.2d 577 (1976), is that in order for a court to determine whether a waiver was voluntarily and intelligently undertaken, the court will look to the totality of the facts and circumstances of each case. Tran argues that because he simply answered "yes" to the circuit court's questions during the colloquy, the court should have realized that there was a language barrier and that his waiver of his rights might not be knowing and intelligent.

In Tran's third point of error, he claims that he had a right to an interpreter during every stage of the proceedings and particularly during the proceedings preceding his signing the Stipulation and the circuit court erred by not ensuring that he had an interpreter.

In Tran's fourth point of error, he claims that the circuit court erred by not applying the "totality of the facts and circumstances" when it reviewed the Third Petition. Tran argues that in reviewing his claim that he did not voluntarily, knowingly, and intelligently waive his rights, the circuit court should have taken into account his background, experience, and conduct, including that (1) the neurological report clearly found that his cognitive processing was borderline to impaired and he was borderline to low-average on tasks requiring him to identify concepts based on verbal feedback; (2) he had to speak through an interpreter during the neuropsych exam; (3) there was no opportunity to review the Stipulation prior to a colloquy by the court; (4) he was not asked whether he was promised anything in exchange for the Stipulation; (5) an interpreter was not present

during consultation with his trial counsel about the Stipulation; (6) there was no strategic advantage to entering into the Stipulation; and (7) the circuit court, State, and his trial counsel conspired to trick him.

In Tran's fifth point of error, he claims that he did not voluntarily, knowingly, and intelligently waive his rights because he was not afforded a full and complete colloquy after he reviewed the Stipulation with his trial counsel. Tran contends the circuit court should have conducted a colloquy after he entered into the written Stipulation.

The overarching issue on appeal is whether Tran voluntarily, knowingly, and intelligently waived his rights when he entered into the Stipulation. In summary, he contends that his waiver was not voluntary, knowing, and intelligent because he did not speak English, the circuit court failed to conduct a colloquy at trial after Tran entered into the Stipulation, and no interpreter was present when he consulted with his trial counsel regarding the Stipulation.

Tran did not prove the existence of extraordinary circumstances to justify his failure to raise these issues in his direct appeal, First Petition, and Second Petition. Therefore, these issues were waived. HRPP Rule 40(a)(3).

In Tran's second point of error, he claims (1) the circuit court erred when it limited its review of the Third Petition to "evidence in the record"; (2) the circuit court's COLs 6, 9, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 41, and 42 were erroneous because the court did not consider any other evidence; and (3) despite his identifying his Third Petition as a petition for a writ of habeas corpus, the circuit court refused to consider evidence submitted outside the record. These arguments are without merit. The circuit court considered the evidence before it.

In Tran's sixth point of error, his claim that he had "a right to effective assistance of counsel including a

neurological examination prior to trial" was also made in his First Petition. Tran's First Petition was denied on April 23, 2003. Therefore, the issue was previously ruled upon, and relief pursuant to HRPP Rule 40 is not available. HRPP Rule 40(a)(3).

In Tran's seventh point of error, he claims that he was not provided page 19 of the circuit court's FOF/COL/Order. On May 19, 2008, this court ordered the appellate clerk to send Tran a copy of the circuit court's FOF/COL/Order that included page 19. This court further ordered that within 20 days after service of the order, Tran could file a supplemental opening brief addressing issues related only to page 19. Tran's claim of error was remedied. He did not file a supplemental brief. Therefore, any claims related to page 19 are waived. HRAP Rule 28(b)(7).

Therefore,

The Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set, Aside, or Correct Judgment and Release from Illegal Custody Through a Writ of Habeas Corpus filed on October 17, 2006 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, August 22, 2008.

On the briefs:

Dat Minh Tran,
Petitioner-Appellant pro se.

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



Chief Judge



Associate Judge


Associate Judge