

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28445

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

MASON HAROLD HIRAKAWA, Petitioner-Appellant,
STATE OF HAWAI'I, Respondent-Appellee

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP No. 06-1-0009)
(Cr. Nos. 02-1-1700 and 04-1-0321)

ORDER DISMISSING APPEAL

(By: Watanabe, Presiding J., and Nakamura, J.;
with Foley, J., concurring separately)

Petitioner-Appellant Mason Harold Hirakawa (Hirakawa), pro se, appeals from the Findings of Fact, Conclusions of Law, and Order (the Order) filed on February 27, 2007 in the Circuit Court of the First Circuit (circuit court),¹ which denied his Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody filed on February 13, 2006 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (Rule 40 Petition).

We conclude that this appeal is moot and, therefore, dismiss the appeal.

BACKGROUND

A. The Criminal Cases Underlying Hirakawa's Rule 40 Petition

In criminal case Cr. No. 02-1-1700 (Case 1), Hirakawa was charged with committing, between July 19 and August 6, 2002, one count of Unauthorized Control of Propelled Vehicle, in violation of Hawaii Revised Statutes (HRS) § 708-836 (Supp.

¹ The Honorable Michael D. Wilson signed the Order.

2007).² In criminal case Cr. No. 04-1-0321 (Case 2), Hirakawa was charged with committing, on February 16, 2004, one count of Unauthorized Control of Propelled Vehicle, in violation of HRS § 708-836.

Hirakawa pled guilty as charged in both cases. In Case 1, Hirakawa was sentenced on January 8, 2003 to serve 153 days of incarceration and five years of probation and ordered to pay restitution in the amount of \$550. In Case 2, Hirakawa was sentenced on November 10, 2004 to serve five years of incarceration with a mandatory minimum prison term of one year as

² HRS § 708-836 (Supp. 2007) provides currently as it did on July 19, 2002, the date Hirakawa was alleged to have committed the offense of Unauthorized Control of Propelled Vehicle, in relevant part, as follows:

Unauthorized control of propelled vehicle. (1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

(2) "Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

(3) It is an affirmative defense to a prosecution under this section that the defendant:

(a) Received authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use; or

(b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.

(4) For the purposes of this section, "owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership; provided that if there is no registered owner of the propelled vehicle or unrecorded owner of the vehicle pending transfer of ownership, "owner" means the legal owner.

(5) Unauthorized control of a propelled vehicle is a class C felony.

a repeat offender, to be served concurrently with any other sentence being served. He was also ordered to pay restitution in the amount of \$1,678.

On the same day, November 10, 2004, Hirakawa's probation in Case 1 was revoked and Hirakawa was sentenced to five years of incarceration.

No direct appeal was taken from either case.

B. Hirakawa's Hearing Before the Hawaii Paroling Authority to Set His Minimum Prison Terms

HRS § 706-669 (1993) provides, in relevant part:

Procedure for determining minimum term of imprisonment. (1) When a person has been sentenced to an indeterminate or an extended term of imprisonment, the Hawaii paroling authority shall, as soon as practicable but no later than six months after commitment to the custody of the director of the department of public safety hold a hearing, and on the basis of the hearing make an order fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole.

(Emphasis added; brackets omitted.)

Hirakawa's minimum-term hearing was not held until September 19, 2005, more than ten months after Hirakawa was committed to the custody of the director of the Department of Public Safety (DPS) in Case 2. Respondent-Appellee State of Hawai'i (State) asserts that the delay occurred because the DPS mistakenly transferred Hirakawa to a Mississippi prison before his minimum-term hearing was held and therefore had to transfer Hirakawa back to Hawai'i for the hearing. Hirakawa asserts, however, that he was not sent to Mississippi until July 25, 2005. He also claims that he was never sent back to Hawai'i for the hearing and that the hearing was held "through a video monitor" while he was incarcerated in Mississippi.

In its Notice and Order of Fixing Minimum Term(s) of Imprisonment (Notice) for Hirakawa, the Hawaii Paroling Authority (HPA) set Hirakawa's minimum term of imprisonment for Case 1 to

expire on December 5, 2006 and the minimum term of imprisonment for Case 2 to expire on August 14, 2006. At the bottom of the Notice is a certificate with the conformed rubber-stamp signature of J. Macadamia (Macadamia), Secretary of the HPA, in which Macadamia certifies that "a true and correct copy of this document was served to the prisoner on 9-26-05[.]" The certification does not indicate whether service was made by mail or personal service, although the Notice contains check-off boxes to so indicate.

C. The Rule 40 Petition

On February 13, 2006, Hirakawa filed the Rule 40 Petition underlying this appeal, which alleged that he was being held unlawfully based on the following grounds:

(1) The HPA failed to conduct a hearing to set his minimum-term sentence within the time limit required by HRS § 706-669, thereby denying him due process;

(2) He was denied effective assistance of counsel because his attorney told him that there was no time limit for the HPA to hold his minimum-term hearing, failed to appear at his minimum-term hearing, and failed to notify interested parties about the hearing;

(3) The HPA's decision was clearly erroneous in view of the reliable, probative, and substantial evidence because by the time he was seen by the HPA, he had served one-third of his prison term and the delay prolonged the time for seeking a reduction of his minimum term since he was told that he could only apply for a reduction six months after the minimum term was set; and

(4) His rights under 42 United States Code Annotated (U.S.C.A.) § 1983 and § 1 of the 14th Amendment of the United States Constitution were violated because when he was sentenced to the concurrent prison terms in Cases 1 and 2, the judge

imposed a one-year mandatory minimum, which, with credit for time already served, was completed two months after he was sentenced.

After the State filed an Answer to the Rule 40 Petition on June 15, 2006, the circuit court summarily denied Hirakawa's petition on February 27, 2007 and concluded, in relevant part, as follows:

3. State v. Monalim, 89 Hawai'i 474, 974 P.2d 1064 (1998) held that the HPA's violation of its own rules did not, in itself, constitute a due process violation and entitle the parolee to relief. A parolee is entitled to relief only if the State's failure to comply with its administrative rules and the statute was both unreasonable and prejudicial, with the parolee having the burden of showing that the failure caused him or her actual prejudice. Monalim, 89 Hawai'i at 476. Thus, the delay in setting [Hirakawa's] minimum terms does not in itself constitute a due process violation nor entitle [Hirakawa] to relief. [Hirakawa] must show actual prejudice.
4. [Hirakawa] claims as actual prejudice that the HPA set his thirty-month minimum sentence eighteen months after he was committed to the custody of the Director of the [DPS]. [Hirakawa's] claim that he served eighteen months by the time of the setting of his minimum terms by the HPA is incorrect. [Hirakawa] was sentenced to five years incarceration on November 10, 2004. The HPA held [Hirakawa's] minimum term hearing on September 19, 2005. [Hirakawa's] hearing was held ten months after he was committed to the custody of the Director of the [DPS]. The four month delay does not constitute actual prejudice.
5. [Hirakawa's] claim that the HPA did not inform him of his minimum terms and treatment requirements until nine months after the HPA's hearing is also false. He was notified approximately seven days after the hearing. On September 26, 2005, the HPA certified that a copy of the Notice and Order Fixing Minimum Term(s) of Imprisonment was "served to the prisoner." . . . The Notice and Order of Fixing Minimum Term(s) of Imprisonment contained both the minimum sentence and the specified programs [Hirakawa] was required to complete before he would be eligible for parole.
6. [Hirakawa] also claims as actual prejudice that the HPA's imposition of treatment conditions prevents him from being released by the time of his [sic] minimum sentence. [Hirakawa's] argument incorrectly identifies such conditions as separate rather than additional conditions of his sentence. In other words, the HPA's determination that [Hirakawa] should not be released at the completion of his mandatory

minimum unless he has completed specified treatment is a reasonable exercise of its discretion. A convicted felon and probation violator has no constitutional right to release on parole or work furlough, confinement in a specific prison, a specific security classification, or to rehabilitative programs. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7, 99 S. Ct. 2100, 22103 [sic], 60 L. Ed. 2d 668, 675 (1979).

7. [Hirakawa's] claim of ineffective assistance of counsel also lacks support in the record. See State v. Smith, 68 Haw. 304, 712 P.2d 496 (1986); State v. Allen, 7 Haw. App. 89, 744 P.2d 789 (1987).
8. [Hirakawa] claims he was discriminated against pursuant to 42 U.S.C.A. Section 1983 and the U.S. Constitution Amendment XIV Section 1 because the Administrative Counselor of Halawa Correctional Facility confused [Hirakawa] with another inmate having the same last name.
9. In order to prevail on a claim of violation of equal protection, [Hirakawa] has the burden of showing intentional discrimination. McClesky v. Kemp, 481 U.S. 279, 292 (1987); Sischo-Nownejad v. Merced Community College Dist.; 934 F.2d 1104, 1112 (9th Cir. 1991).
10. [Hirakawa] has failed to show intentional discrimination.

Hirakawa filed his Notice of Appeal from the denial of his Rule 40 Petition on March 13, 2007.

ISSUES ON APPEAL

On appeal, Hirakawa contends that:

(1) He was denied due process by a minimum-term hearing that was held without the presence of defense counsel, the prosecuting attorney, and the chairperson of the HPA;

(2) He was denied due process because: (a) the HPA failed to hold his minimum-term hearing within six months, as required by HRS § 706-669(1); and (b) he was not notified of his minimum term until twenty months after he was taken into custody, thus delaying his eligibility for programs he would need to complete to be eligible for parole; and

(3) He was deprived of the privileges and immunities of a citizen; deprived of life, liberty, or property without due process of law; and denied the equal protection of the law.

STANDARD OF REVIEW

An HRPP Rule 40 petition may be denied without an evidentiary hearing "if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner." HRPP Rule 40(f). Whether a trial court erred in denying a Rule 40 petition without a hearing is reviewed on appeal *de novo*. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

Findings of fact made by a circuit court are subject to the "clearly erroneous" standard of review on appeal. Id. at 428, 879 P.2d at 533.

DISCUSSION

A. Whether the Rule 40 Petition Presented a Colorable Claim for Release from Custody, Requiring an Evidentiary Hearing

The Hawai'i Supreme Court has stated that

[a]s a general rule, a hearing should be held on a Rule 40 petition for post-conviction relief where the petition states a colorable claim. To establish a colorable claim, the allegations of the petition must show that if taken as true the facts alleged would change the verdict,³ however, a petitioner's conclusions need not be regarded as true. Where examination of the record of the trial court proceedings indicates that the petitioner's allegations show no colorable claim, it is not error to deny the petition without a hearing. *The question on appeal of a denial of a Rule 40 petition without a hearing is whether the trial record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court.*

³ In this case, Hiramawa is not challenging the verdicts in Cases 1 and 2. Instead, he seeks to be released from custody due to an untimely minimum-term sentencing hearing held by the HPA. For purposes of review and disposition, the Hawai'i Supreme Court's holding in Dan is still instructive because the grounds for initiating Rule 40 proceedings include relief sought from judgment and custody. HRPP Rule 40(a).

Id. at 427, 879 P.2d at 532 (quoting with approval but overruling the holding of State v. Allen, 7 Haw. App. 89, 92-93, 744 P.2d 789, 792-93 (1987)) (emphasis in original; footnote added). See also Hutch v. State, 107 Hawai'i 411, 414, 114 P.3d 917, 920 (2005). Although this standard is not entirely applicable to the instant appeal since Hirakawa is not alleging facts that would change the verdict in Cases 1 and 2, we nonetheless agree that the standard for a Rule 40 hearing is whether the petitioner presented a colorable claim to the circuit court. See id.

1. Hirakawa's Belated Minimum-Term Hearing

There is no dispute in the present case that Hirakawa's minimum-term hearing before the HPA did not take place before the expiration of the six-month statutory deadline established by HRS § 706-669.

In Monalim v. State, 89 Hawai'i 474, 974 P.2d 1064 (App. 1998), this court vacated a circuit court's decision summarily denying as patently frivolous a Rule 40 petition which alleged that the petitioner was entitled to post-conviction relief because the State had failed to hold a parole revocation hearing within sixty days after the petitioner was recommitted to prison, as required by HRS § 706-670(7) (1993). We held that a petitioner is not entitled to relief for the HPA's failure to comply with the statutory time limit for parole revocation hearings unless

the record shows that the failure to comply (1) was unreasonable and (2) caused the petitioner actual prejudice. With respect to (1), the State's failure to comply with the specified time limit is presumptively unreasonable and it is the HPA's burden to rebut the presumption. With respect to (2), however, it is the petitioner's burden to prove that the State's unreasonable failure to comply caused actual prejudice to the petitioner.

Monalim, 89 Hawai'i at 476, 974 P.2d at 1066. In Monalim, because the record did not include any affidavits or sworn or certified statements to support the State's representation that

(1) the petitioner's hearing was reasonably delayed due to a power outage, and (2) the petitioner pled guilty to two violations of his parole and, therefore, was not prejudiced by the delayed hearing, we vacated the circuit court's order denying the Rule 40 petition and remanded the case for further proceedings. Id. at 476-77, 974 P.2d at 1066-67.

Under the first prong of the Monalim test, the HPA's four-month delay in holding Hirakawa's minimum-term hearing was presumptively unreasonable and the HPA had the burden of rebutting that presumption. Id. at 476, 974 P.2d at 1066. The State argued that the hearing delay was caused by Hirakawa's mistaken transfer to Mississippi and the time it took to get Hirakawa back to Hawai'i for the hearing. Hirakawa countered that he was not transferred to Mississippi until after the six-month deadline for the hearing, which was held via video. A colorable claim was therefore presented regarding the reasonableness of the delay in holding the hearing. A hearing could have resolved the diametrically opposed factual assertions regarding the cause of the delay.

As to the second prong of the Monalim test, Hirakawa had the burden of establishing that he suffered prejudice as a result of the delay. In his petition, Hirakawa claimed that the delay in his minimum-term hearing prejudicially prolonged the period of time before he became eligible for parole because he was told that he could only apply for a reduction of his minimum term six months after the minimum term was set. In light of the undisputed violation of HRS § 706-669 and Hirakawa's allegation of prejudice as a result of the violation, Hirakawa's claim was not patently frivolous. A colorable claim was therefore presented and warranted an evidentiary hearing.

2. The Ineffective-Assistance-of-Counsel Claim

Hirakawa clearly had a constitutional due-process and statutory right to representation by counsel at his minimum-term hearing. D'Ambrosio v. State, 112 Hawai'i 446, 466, 146 P.3d 606, 626 (App. 2006). Hirakawa claims that he was denied the effective assistance of counsel as a result of his attorney's failure to appear at Hirakawa's minimum-term hearing: The State asserts, however, that Hirakawa waived his right to counsel.

As in D'Ambrosio, the record on appeal does not include the record or transcript of the HPA proceedings and we are, therefore, unable to make an informed ruling as to whether Hirakawa presented a colorable claim of ineffective assistance of counsel or waived his right to counsel. Under these circumstances, Hirakawa's claim was not patently frivolous and a hearing would have been useful to discern the relevant facts. Id., 146 P.3d at 626.

3. Absence of the HPA Chairperson and the Prosecutor

Hirakawa claims on appeal that the prosecuting attorney and the chairperson of the HPA were not present at his minimum-term hearing. This issue was not raised in his Rule 40 Petition and will not be considered on appeal. "[A]n issue raised for the first time on appeal will not be considered by the reviewing courts." State v. Sunderland, 115 Hawai'i 396, 400, 168 P.3d 526, 530 (2007) (quoting State v. Naeole, 62 Haw. 563, 570, 617 P.2d 820, 826 (1980)).

4. Notice of Minimum Term Setting

The circuit court found that the HPA sent Hirakawa timely notice of the HPA's decision regarding his minimum term. This finding is supported by the certificate of service attached to the Notice and is not clearly erroneous.

5. Privileges and Immunities and Equal Protection

Hirakawa did not allege in his Rule 40 Petition that his privileges and immunities as a citizen and right to equal protection of the law were violated. Therefore, we will not address these arguments on appeal. See Sunderland, 115 Hawai'i at 400, 168 P.3d at 530 (quoting Naeole, 62 Haw. at 570, 617 P.2d at 826).

B. This Appeal is Moot.

Although we conclude that the circuit court erred in denying Hirakawa's Rule 40 Petition without a hearing because Hirakawa presented colorable claims of a violation of his right to due process and effective assistance of counsel, we also conclude that this appeal is moot.

In his Rule 40 Petition, Hirakawa sought to be released from custody on parole due to the alleged errors related to his minimum-term hearing. Hirakawa has not alleged that he would have gotten a lower minimum-term sentence if his minimum-term hearing had been held within the statutory time period or if he had been represented by counsel at the hearing. Although Hirakawa asserts that his chance at parole was illegally delayed because his enrollment in required prison programming was likewise delayed, he admits that he completed all of the originally required programming by October 27, 2006.⁴ Furthermore, Hirakawa has already served the minimum term of imprisonment set by the HPA, and we are unaware of any legal authority that would allow Hirakawa to be released from prison on parole due to a delay in the setting of his minimum prison term.

⁴ Although Hirakawa argues on appeal that he has since been burdened by the HPA's October 27, 2006 requirement that he participate in a "Lifeline" program, this argument was not raised in his Rule 40 Petition and is consequently waived. Sunderland, 115 Hawai'i at 400, 168 P.3d at 530 (quoting Naeole, 62 Haw. at 570, 617 P.2d at 826).

The Hawai'i Supreme Court has repeatedly said that a case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events have so affected the relations between the parties that the two conditions for justiciability relevant on appeal--adverse interest and effective remedy--have been compromised.

In re Carl Corp. v. State, Dep't of Educ., 93 Hawai'i 155, 164, 997 P.2d 567, 576 (2000) (internal brackets, ellipsis, and quotation marks omitted). See also Right to Know Committee v. City Council of Honolulu, 117 Hawai'i 1, 8, 175 P.3d 111, 118 (App. 2007). Since Hiramawa has already served his minimum term of imprisonment and completed all originally required programming, there is no effective remedy that can be afforded to him on appeal. Under these circumstances, we must conclude that Hiramawa's appeal is moot.

Accordingly, Hiramawa's appeal is dismissed.

DATED: Honolulu, Hawai'i, June 12, 2008.

On the briefs:

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