

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 28682

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

RODNEY TORRES, Petitioner-Appellant,
v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(S.P.P. NO. 04-1-0007K)

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAII

2008 SEP 25 AM 8:34

FILED

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Rodney Torres appeals from the Findings of Fact, Conclusions of Law and Order Denying Petition to Vacate, Set Aside or Correct Judgment or to Release Petitioner from Custody (Order Denying Petition), filed on July 11, 2007 in the Circuit Court of the Third Circuit (circuit court).¹

On April 6, 1994, Torres was charged in Cr. No. 94-0076K with sexually assaulting the complaining witness, who was less than 14 years old. On March 24, 1995, Torres was convicted of Sexual Assault in the First Degree, in violation of Hawaii Revised Statutes § 707-730(1)(b)(1993). This court subsequently affirmed Torres's conviction. State v. Torres, 85 Hawai'i 417, 419, 945, P.2d 849, 851 (App. 1997).

On August 6, 2004, Torres filed a petition for post-conviction relief (Petition) pursuant to Hawai'i Rules of Penal Procedure Rule 40. In the Petition, Torres alleged three grounds for relief. First, Torres alleged that his sentence was illegal because:

7. Petitioner is informed and believes, and thereupon alleges, that pursuant to the holding in State v. Mueller, 102 HAW. 391, 393 (2203) [sic], that the Respondent is required to prove actual penetration beyond a reasonable doubt in order to convict Petitioner of sexual assault [sic] in the first degree, and that absent of such proof Petitioner's conviction must be reversed and a judgment entered for the lesser offense of sexual assault in the third degree.

¹

The Honorable Elizabeth Strance presided.

Second, Torres alleged that he was denied a fair trial because:

10. A retired circuit court judge was a member of the jury pool in Petitioner's case.

11. During jury selection, the retired circuit court judge stood up and stated that Petitioner's witness was a liar and would not give credible [sic] testimony at trial. This statement was heard by all of the members of the jury pool that became the sitting jury in this case.

12. the [sic] above-mentioned retired circuit court judge also became a sitting member of the jury in this case.

13. Petitioner is informed and believes, and thereupon alleges, that the above-mentioned statement and/or the presence of the above-mentioned retired judge biased the jury against Petitioner, and therefore, Petitioner was deprived of his right to a fair trial in this case.

Finally, Torres alleged that his trial counsel was ineffective because:

15. Despite the above-mentioned statement by the retired circuit court judge, Petitioner's trial attorney failed to even attempt to have the retired judge disqualified from appointment to the jury.

16. Petitioner's trial attorney failed to either move for a mistrial, or move for an entirely new jury pool from which to choose from based upon the above-mentioned statement of the retired circuit court judge.

17. Petitioner's trial attorney failed to raise the defense that Respondent had not established that petitioner had actually penetrated the victim's vaginal entrance [sic].

18. Petitioner is informed and believes, and thereupon alleges, that the above-described failures by his trial attorney establishes the attorney's lack of skill, judgment, or diligence, and that these failures resulted in Petitioner being convicted of sexual assault in the first degree.

Torres subsequently filed a motion to supplement the record. On November 27, 2006, the circuit court held a hearing on the motion at which the parties submitted to the court, by stipulation, eight transcripts from Cr. No. 94-0076K. Torres testified on his own behalf, and Respondent-Appellee State of Hawai'i called witnesses including several court reporters and Vincent Tio, Jr., who was Torres's trial attorney. On January 10, 2007, the circuit court issued the Findings of Fact, Conclusions of Law and Order Denying Motion to Supplement the Record (Order Denying Motion to Supplement Record).

On January 19, 2007, Torres filed a Notice and Motion for New Trial; Arrest of Judgment; Correction of Judgment; Amendment of Judgment; or Reconsideration of Findings of Fact, Conclusions of Law and Order Denying Motion to Supplement the Record (New Trial Motion). In that motion, Torres argued that the circuit court's Order Denying Motion to Supplement Record had prematurely found, without "a full hearing on the merits," that there was no evidence that Tio was ineffective. The circuit court held a hearing on the New Trial Motion on April 18, 2007, where Torres again testified on his own behalf.

Finally, on July 11, 2007, the circuit court issued the Order Denying Petition.

On appeal, Torres challenges multiple findings of fact and conclusions of law from both the Order Denying Motion to Supplement Record and the Order Denying Petition. In summary, Torres argues that:

(1) The Order Denying Motion to Supplement Record "exceeded the scope of the [m]otion" by making findings regarding the alleged ineffectiveness of Tio. These premature findings "tainted" the similar findings that the circuit court subsequently made in the Order Denying Petition. They also reflect "bias or prejudgment" by the circuit court.

(2) "The court was in error in not allowing [Torres] to supplement the record on appeal. The merit of the petition relies on the inaccuracy of the record." Thus, the circuit court erred in finding that the testimony of Torres was not credible, and in concluding that there was no evidence that the transcripts did not accurately portray what happened at trial.

(3) The circuit court erred in its findings and conclusions with regard to comments made during trial by one of the jurors, a retired circuit court judge (the Juror), about whether he had presided in a another case involving Torres's wife.

(4) The circuit court erred in its findings and conclusions with regard to whether jurors would have known during

voir dire which potential witnesses were defense witnesses and which were prosecution witnesses.

(5) "This appellate court could, in the exercise of its supervisory power, require that the record be supplemented and that the [Order Denying Petition was] erroneous."

(6) If the record is supplemented as Torres contends it should be, then Torres's trial counsel, Tio, would have been ineffective.

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, as well as the relevant statutory and case law, we resolve Torres's points of error as follows:

(1) Even assuming arguendo that the circuit court erred by prematurely entering findings with regard to the alleged ineffectiveness by Tio in the Order Denying Motion to Supplement Record, any such error was harmless and did not "taint" the subsequent findings made by the circuit court in the Order Denying Petition. During the hearing on the New Trial Motion, the circuit court allowed Torres to present any additional evidence in support of his claims, and Torres took advantage of that opportunity and testified. The court subsequently entered the Order Denying Petition in which it again found that Tio was not ineffective. Thus, to the extent that there was any unfairness to Torres in the court addressing the ineffectiveness of counsel issue in the Order Denying Motion to Supplement Record, that unfairness was eliminated by the subsequent opportunity to offer evidence. Similarly, the court's willingness to allow Torres to offer additional evidence before ruling on the Petition rebuts the suggestion by Torres that the court was biased or had prejudged his claims.

(2) The circuit court did not err in denying Torres's motion to supplement the record and in rejecting Torres's testimony about a prejudicial statement that the Juror allegedly

made during jury selection in Cr. No. 94-0076K.²

The transcripts of jury selection in Cr. No. 94-0076K do not reflect the statement that Torres alleges was made by the Juror. Those transcripts were certified in writing as accurate by the two court reporters who prepared them. Moreover, both of those court reporters testified, at the hearing on Torres's motion to supplement the record, that the transcripts they prepared were accurate to the best of their knowledge.³ The circuit court also heard testimony from Tio, who denied that the Juror had said that any of Torres's witnesses were incompetent, liars, or would not give credible testimony.

We conclude that the circuit court did not err in finding that the trial transcripts were accurate and in rejecting Torres's testimony. The written certifications and oral testimony of the court reporters, together with the testimony of Tio, provided substantial evidence to support the circuit court's findings and conclusions. Moreover, the circuit court was free to accept or reject Torres's testimony in whole or in part. Cf. State v. Malani, 59 Hawai'i 167, 171, 578 P.2d 236, 239 (1978); Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 92, 34 P.3d 16, 22 (2001) (stating that "the credibility of witnesses and the weight to be given their testimony are within the province of the trier of fact and, generally, will not be disturbed on appeal").

(3) With regard to Torres's contentions concerning the third and fourth issues identified above, we conclude that there was substantial evidence in the record to support the circuit court's findings and conclusions, and that accordingly, Torres's contentions lack merit.

² Torres testified at the hearing on the motion to supplement the record that during jury selection in Cr. No. 94-0076K, the Juror stood up, pointed at Torres, and said "[Torres's] witness is incompetent to be a witness."

³ Court reporter Kurt Faut testified that he prepared one of the transcripts based on notes and an audio cassette tape which had been prepared by another court reporter who was present at the trial, but apparently unavailable to testify at the hearing. Court reporter Susan Nakamoto testified that she was both present at the trial and prepared a transcript of those proceedings.

