

NO. 28809

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

WILLIAM BENJAMIN NAPEAHI, Petitioner-Appellant, v.  
STATE OF HAWAII, Respondent-Appellee

EARL RIMANDO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(SPECIAL PROCEEDINGS PRISONER NO. 07-1-0014;  
CRIMINAL NO. 00-1-0014)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant William Napeahi (**Napeahi**) appeals the Findings of Fact, Conclusions of Law, and Order Denying Petition for Post-Conviction Relief Without a Hearing, filed on September 17, 2007, in the Circuit Court of the First Circuit (**Circuit Court**).<sup>1/</sup>

On April 16, 2007, Napeahi filed a Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody (**Petition**). Napeahi claimed: (1) his sentence on November 28, 2000 violated Apprendi v. New Jersey which was decided on June 26, 2000; (2) he was denied the right to testify because his trial counsel and the trial judge did not explain the evidence against him prior to the close of his case, did not discuss the concept of proof beyond a reasonable doubt, and the dangers of not testifying, thereby violating his constitutional right to testify, and Forester poked Napeahi with a pen and told him to take a "deal;" and (3) he was provided ineffective assistance of counsel because counsel did not contact Napeahi to discuss the above points of error for his direct appeal.

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<sup>1/</sup> The Honorable Steven S. Alm presided.

On appeal, Napeahi contends that: (1) he did not waive his right to testify; (2) his sentence is illegal under Apprendi v. New Jersey, 530 U.S. 466 (2000) (Apprendi); (3) he was provided with ineffective assistance of counsel; and (4) the Circuit Court erred when it denied his motion for appointment of counsel.

The State contends this court lacks jurisdiction because Napeahi's notice of appeal was untimely and that the Circuit Court did not err by denying Napeahi's Petition.

A notice of appeal filed by a prisoner is deemed adequate when given to a prison official for mailing. Setala v. J.C. Penney Co., 97 Hawai'i 484, 489, 40 P.3d 886, 891 (2002). Napeahi's Certificate of Service for the Notice of Appeal is dated October 15, 2007. Therefore, Napeahi's Notice of Appeal was timely filed within 30 days from a final appealable order and this court has jurisdiction. Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 4(a).

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 Napeahi's points of error as follows:

(1) Napeahi claims that he did not knowingly, intelligently, and voluntarily waive his right to testify at trial. In Napeahi's direct appeal, this court concluded that "the circuit court did in fact conduct the waiver colloquy and properly advised Napeahi of his right to testify, and that Napeahi waived this right." Napeahi's contention is without merit.

(2) Napeahi claims that his extended sentence is illegal under Apprendi and its progeny. Napeahi's direct appeal was decided on September 30, 2003. In Loher v. State, 118 Hawai'i 522, 537-38, 193 P.3d 438, 453-54 (App. 2008), this court recognized that the United States Supreme Court's extended

sentencing decisions in Blakely v. Washington, 542 U.S. 296 (2004) (Blakely), and United States v. Booker, 543 U.S. 220 (2005) (Booker), which clarified Apprendi, announced new rules of constitutional criminal procedure and do not apply retroactively on collateral review. As Napeahi's conviction became final prior to Blakely and Booker, Napeahi is not entitled to retroactive application of Blakely and Booker on collateral review. See Loher 118 Hawai'i at 538, 193 P.3d at 454.

(3) Napeahi claims that he received ineffective assistance of appellate counsel. Napeahi claims that, in arguing that Napeahi did not knowingly, intelligently, and voluntarily waive his right to testify, appellate counsel did not raise various claims that Napeahi believes would have bolstered his no-waiver argument. On direct appeal, this court carefully reviewed the record concerning Napeahi's waiver and concluded that "the circuit court did in fact conduct the waiver colloquy and properly advised Napeahi of his right to testify, and that Napeahi waived this right." Appellate counsel was not ineffective for failing to raise alternative arguments on this issue on direct appeal. See Briones v. State, 74 Haw. 442, 465-67, 848 P.2d 966, 977-78 (1993).

Regarding his other claims of ineffective assistance of appellate counsel, we note the following. The record does not reflect that Napeahi claimed that he was assaulted with a pen by his trial counsel. However, the issue of Napeahi's discontentment with his counsel, and his request for new counsel, was raised and addressed on direct appeal. See HRPP 40(a)(3). Even if trial counsel advised Napeahi to take a plea deal, he did not do so, and instead proceeded to trial. Napeahi has not demonstrated that his defense was impaired by not taking a "deal," despite being advised to do so by his trial counsel. Therefore, trial counsel was not ineffective and appellate

counsel's failure to raise these issues was not ineffective assistance of appellate counsel.

Finally, Napeahi also contends that appellate counsel failed to contact him so that the above claims could be raised in his opening brief. Since none of the above claims have merit, appellate counsel's alleged failure to contact Napeahi regarding these issues did not impair his defense and appellate counsel was not ineffective.

(4) Napeahi did not state any colorable claim for relief, therefore, the circuit court did not err by denying Napeahi's motion for appointment of counsel. See HRPP 40(i).

Therefore, we affirm the Circuit Court's Findings of Fact, Conclusions of Law, and Order Denying Petition for Post-Conviction Relief Without a Hearing, filed on September 17, 2007.

DATED: Honolulu, Hawai'i, February 12, 2009.

On the briefs:

William Napeahi  
Pro Se Petitioner-Appellant

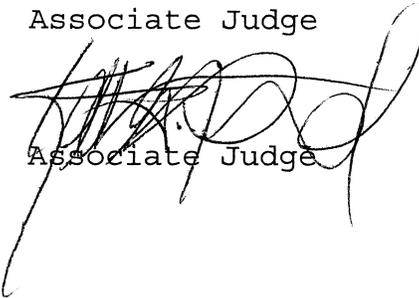
Peter B. Carlisle  
Prosecuting Attorney  
Loren J. Thomas  
Anne K. Clarkin  
Deputy Prosecuting Attorneys  
for Respondent-Appellee



Chief Judge



Associate Judge



Associate Judge