

NO. 28900

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
KEVIN M. MURPHY, Defendant-Appellant

EMERSON
CLERK OF THE COURT
STATE OF HAWAII

2009 JUL 10 AM 7:45

FILED

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(CASE NO. 2DTA-07-00643)

SUMMARY DISPOSITION ORDER

(By: Nakamura, Presiding Judge, Fujise and Leonard, JJ.)

Defendant-Appellant Kevin M. Murphy (**Murphy**) appeals from the Judgment of Conviction and Sentence entered by the District Court of the Second Circuit^{1/} (**District Court**) on November 16, 2007, convicting and sentencing him for operating a vehicle under the influence of an intoxicant, in violation of Hawaii Revised Statutes § 291E-61(a)(2) (Supp. 2006).

As his sole point of error on appeal, Murphy asserts that he was provided ineffective assistance of trial counsel because his counsel failed to subpoena the booking room officer, who reportedly observed that Murphy was not intoxicated; the owner of the car Murphy was driving at the time of his arrest, who reportedly would have corroborated Murphy's testimony about certain issues related to the car; and Murphy's doctor and/or medical records, to corroborate Murphy's testimony that, as a result of a 2005 motorcycle accident, he suffered an injury to his foot, usually walked with a cane, and suffered a cracked skull and crushed septum, which have affected his eyesight and the appearance of his eyes.

Upon a thorough review of the record and the briefs submitted by the parties, and having duly considered the issues

¹ The Honorable Rhonda I. L. Loo presided.

and arguments raised on appeal, as well as the statutory and case law relevant thereto, we resolve Appellant's claim as follows.

The record contains no sworn statements as to the contents of the potential evidence or other evidence from which trial counsel's trial strategy or lack thereof may be assessed. Murphy's claim of ineffective assistance of counsel cannot properly be determined. State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998). The Hawai'i Supreme Court has held that:

where the record on appeal is insufficient to demonstrate ineffective assistance of counsel, but where: (1) the defendant alleges facts that if proven would entitle him or her to relief, and (2) the claim is not patently frivolous and without trace of support in the record, the appellate court may affirm defendant's conviction without prejudice to a subsequent [Hawaii Rules of Penal Procedure] Rule 40 petition on the ineffective assistance of counsel claim.

State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592-93 (1993) (footnote omitted); see also Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 976-77 (1993). In this case, the record on appeal is not adequate to assess Appellant's claim of ineffective assistance of counsel. Thus, we do not rule on Appellant's ineffective-assistance-of-trial-counsel claim.

Accordingly, we affirm the District Court's November 16, 2007 Judgment, without prejudice to Murphy raising his stated claim of ineffective assistance of trial counsel in a Hawai'i Rules of Penal Procedure Rule 40 proceeding.

DATED: Honolulu, Hawai'i, July 10, 2009.

On the briefs:

David J. Peterson
(Ranken & Dwyer)
for Defendant-Appellant

Renee Ishikawa Delizo
Deputy Prosecuting Attorney
County of Maui
for Plaintiff-Appellee


Presiding Judge


Associate Judge


Associate Judge