

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 29013

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

STYRAN EDDIE RIVERA, Petitioner-Appellant,
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. No. 02-1-0037)
(Cr. No. 00-1-0029)

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SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Styran Eddie Rivera (Rivera) appeals from the "Findings of Fact, Conclusions of Law, and Order Granting Motion to Dismiss Petition for Post-Conviction Relife [sic] and Supplemental Petitions" filed on January 28, 2008 by the Circuit Court of the First Circuit¹ (circuit court).

We affirm.

BACKGROUND

On January 6, 2000, in Criminal No. 00-01-0029, Rivera was charged by way of complaint with three counts of murder in the second degree, one count of murder in the first degree, and one count of hindering prosecution in the first degree. On January 11, 2000, Rivera, who was represented by Peter England Roberts (Roberts), entered a guilty plea to two counts of murder in the second degree, pursuant to a plea agreement under which he would provide information and testimony to Honolulu Police Department detectives and federal and state prosecution agencies or departments, in exchange for which Respondent-Appellee State of Hawai'i (State) would dismiss the remaining counts.

Roberts, whose license to practice law was suspended for five years beginning on January 12, 2000, withdrew as counsel on January 11, 2000 and was replaced by Michael G. M. Ostendorp (Ostendorp) on January 19, 2000, effective January 11, 2000. Sentencing for Rivera was continued to June 27, 2000. On

¹ The Honorable Victoria S. Marks (Judge Marks) presided.

June 26, 2000, Ostendorp filed a motion to withdraw as counsel, which stated that he had been instructed by Rivera to withdraw because Ostendorp had hired Roberts as an employee and there was a "conflict of interest" because Rivera believed that Roberts "ha[d] 'sold him out[.]'" Ostendorp's motion to withdraw was granted, and on July 5, 2000, Dana S. Ishibashi (Ishibashi) was appointed to replace Ostendorp. Sentencing was continued to August 15, 2000 and, subsequently, to October 31, 2000.

A. Motion to Withdraw Guilty Plea

On September 8, 2000, Ishibashi filed on behalf of Rivera a motion to withdraw guilty plea, which claimed that Rivera received ineffective assistance of counsel from Roberts in the pre-guilty phase of Rivera's criminal case. In a declaration of counsel in support of the motion, Ishibashi stated that Rivera claimed that Roberts had told him that if Rivera pled guilty to two counts of murder in the second degree, he would spend no more than four and a half years in prison and "would be on 'work furlough' by [six] years." After Ostendorp was appointed as substitute counsel, he informed Rivera that it was unlikely that the Hawai'i Paroling Authority would set such a low minimum for Rivera since he was pleading to two murders. Rivera also learned that Roberts was now working for Ostendorp and was advising Ostendorp on this case. Rivera "immediately requested that a motion to withdraw his plea be filed." The motion to withdraw guilty plea argued that Rivera was misled as to the time he would spend in prison and the strength of the case against him. On December 21, 2000, the circuit court² entered findings of fact, conclusions of law and order denying Rivera's motion to withdraw guilty plea (order denying motion to withdraw).

Judgment was entered on November 9, 2000 by Judge Marks. Rivera was sentenced to serve two consecutive life terms with the possibility of parole and to pay restitution in the amount of \$5,200. The State thereafter moved to dismiss the remaining counts without prejudice. Rivera appealed from the judgment.

² Judge Marks entered the order denying motion to withdraw.

B. Direct Appeal

On direct appeal, Rivera, who was represented by Ishibashi, raised the following issues: (1) the circuit court erred in denying Rivera's motion to withdraw guilty plea, (2) the circuit court erred in imposing consecutive sentences, (3) the circuit court failed to advise Rivera that the court was not bound by the plea agreement, and (4) the State breached the plea agreement by moving for consecutive sentencing. State v. Rivera, No. 23937 at 1-2 (Haw. Feb. 25, 2002) (SDO).

The Hawai'i Supreme Court affirmed the judgment and held that (1) Rivera was not entitled to withdraw his plea, based on alleged changed circumstances or new information; (2) the circuit court engaged Rivera in a colloquy that fully advised him of his constitutional rights before he entered his guilty pleas; (3) any alleged misrepresentation by Roberts regarding Rivera's potential sentence was cured by the court's colloquy and did not affect the knowing, voluntary, and intelligent nature of Rivera's plea; (4) Roberts' assessment of a potential witness for the State did not affect Rivera's understanding of his constitutional rights or the validity of his pleas; (5) the circuit court did not abuse its discretion in imposing two consecutive life terms with the possibility of parole; (6) the circuit court did not err in accepting Rivera's guilty pleas because the record demonstrated that Rivera was informed that the circuit court was not bound by the plea agreement; and (7) the State did not violate the plea agreement by seeking consecutive sentencing. Id. at 2-3.

C. Rule 40 Petition

On May 15, 2002, Rivera filed a petition to vacate, set aside, or correct judgment or to release Rivera from custody, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (Rule 40 petition). Rivera raised the following issues: (1) Ostendorp was ineffective because he failed to promptly withdraw from the case, which delayed the filing of Rivera's motion to withdraw guilty plea; and (2) Ishibashi was ineffective because he failed to (a) timely file the motion to withdraw guilty plea, (b) argue that Ostendorp was ineffective, (c) argue

that Roberts was ineffective for failing to raise the issue of the circuit court's failure to advise Rivera that the court was not bound by the plea agreement, (d) argue that Roberts was ineffective for telling Rivera that his sentences would be served concurrently, and (e) raise the issue that Rivera was denied his right to counsel when he testified before the grand jury, was debriefed on May 10, 2000, and moved to withdraw his guilty plea. The State opposed the Rule 40 petition.

On September 12, 2002, the circuit court granted Rivera's request for appointment of counsel, and Jerry I. Wilson (Wilson) was appointed to represent Rivera, effective September 18, 2002. On October 8, 2002, Wilson moved to withdraw as counsel, and Wilson's motion was granted. Effective September 18, 2002, James C. Beaman (Beaman) was appointed to represent Rivera. On November 20, 2003, Beaman moved to withdraw as counsel, and Beaman's motion was granted. Effective January 9, 2004, Chester M. Kanai (Kanai) was appointed to represent Rivera. On June 1, 2005, Kanai moved to withdraw as counsel for health reasons. Effective July 13, 2005, Joseph R. Mottl, III was appointed to represent Rivera.

D. First Motion to Supplement Rule 40 Petition

On May 29, 2002, Rivera filed a motion to supplement and amend petition for post-conviction relief to vacate judgment of conviction and sentence filed pursuant to HRPP Rule 40 (first supplement). Rivera sought to supplement his Rule 40 petition with information that Roberts was suspended from the practice of law when Rivera was debriefed and when Rivera testified before the grand jury. Rivera argued that during that time, he was denied his right to counsel because of Roberts' suspension. Rivera also claimed that Ishibashi was ineffective because he failed to present evidence that Roberts' suspension was based on findings of incompetent representation, which would have supported Rivera's claims and undermined Roberts' credibility.

E. Second Supplement to Rule 40 Petition

On September 17, 2007, Rivera filed a supplement to his Rule 40 petition (second supplement). The second supplement argued that Roberts had given Rivera false information to induce

Rivera to accept the plea agreement. The second supplement states that Roberts advised Rivera to comply with the terms of his plea agreement and that one of the benefits would be that the U.S. Attorney's office would request a downward departure in Rivera's federal case that would relieve Rivera of mandatory sentencing and result in Rivera receiving a forty-eight-month term of imprisonment.

F. State's Motion to Dismiss

On October 25, 2007, the State filed a motion to dismiss petition for post-conviction relief and supplemental petitions (motion to dismiss). The State argued that the issues raised by the Rule 40 petition, the first supplement, and the second supplement were either previously raised in the motion to withdraw guilty plea or on direct appeal, or were waived. A hearing was held on the motion to dismiss on November 14, 2007.

G. Order Denying Rule 40 Petition

On January 28, 2008, the circuit court³ filed findings of fact, conclusions of law, and order granting motion to dismiss petition for post-conviction relief and supplemental petitions (order denying Rule 40 petition). The circuit court held, in relevant part, as follows: (1) Rivera failed to raise the issue that Ostendorp was ineffective either at the hearing on the motion to withdraw guilty plea or on direct appeal, and therefore the issue was waived; (2) the issue of whether Ishibashi was ineffective was previously ruled on at the hearing on the motion to withdraw guilty plea or on direct appeal, or waived; (3) the issue of whether Roberts was ineffective was addressed at the hearing on the motion to withdraw guilty plea and on direct appeal; (4) Rivera's claim that Ishibashi was ineffective for failing to raise the issue that Rivera was denied the right to counsel when he was debriefed by the Honolulu Police Department and testified before the grand jury was without merit because Rivera did both as part of the plea agreement and Ostendorp was available to Rivera by phone at the time of his grand-jury testimony and Roberts, as Ostendorp's paralegal, was present at

³ Judge Marks presided.

Rivera's debriefing and nearby when Rivera testified before the grand-jury hearing; (5) Rivera's claim that Ishibashi was ineffective for failing to present evidence of the reasons that Roberts had been suspended from the practice of law was not presented on direct appeal and therefore waived; (6) Rivera failed to raise the issue that he had been promised a downward departure for his sentence in the federal case in the motion to withdraw guilty plea, and the issue was therefore waived; and (7) the issue of whether Rivera was improperly induced to enter the guilty pleas was previously ruled upon.

Rivera filed a notice of appeal on February 15, 2008.

ISSUES ON APPEAL

Rivera contends that the circuit court abused its discretion in denying his Rule 40 petition because (1) the nature and extent of Roberts' professional misconduct amounted to a constructive denial of Rivera's right to counsel, (2) Ishibashi and Ostendorp were ineffective for delaying the filing of the motion to withdraw guilty plea, which affected the circuit court's perception of Rivera's credibility, (3) Ishibashi was ineffective for failing to adequately argue ineffective assistance by Roberts, and (4) Ostendorp's employer-employee relationship with Roberts created a conflict of interest that constructively denied Rivera his right to counsel during Ostendorp's tenure.

STANDARDS 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).

As 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, 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.*

Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (emphasis in original); Hutch v. State, 107 Hawai'i 411, 414, 114 P.3d 917, 920 (2005). The review of a decision denying a Rule 40 petition without a hearing is de novo. State v. De Guair, 108 Hawai'i 179, 187, 118 P.3d 662, 670 (2005); Dan, 76 Hawai'i at 427, 879 P.2d at 532; see also Hutch, 107 Hawai'i at 414, 114 P.3d at 920.

The circuit court's findings of fact are reviewed for clear error.

A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

Wilton v. State, 116 Hawai'i 106, 110 n.7, 170 P.3d 357, 361 n.7 (2007) (internal quotation marks omitted).

"The circuit court's conclusions of law are reviewed under the right/wrong standard." Id. (internal quotation marks omitted).

The interpretation of a court rule is reviewed de novo. Barbee v. Queen's Medical Center, 119 Hawai'i 136, 152, 194 P.3d 1098, 1114 (App. 2008).

The test for determining if appellate counsel was ineffective is as follows:

If an appealable issue is omitted, then both the issues actually presented on appeal as well as those omitted are evaluated in light of the entire record, the status of the law and, most importantly, counsel's knowledge of both. Counsel's scope of review and knowledge of the law are assessed, in light of all the circumstances, as that information a reasonably competent, informed and diligent attorney in criminal cases in our community should possess. Counsel's *informed* decision as to which issues to present on appeal will not ordinarily be second-guessed. Counsel's performance need not be errorless. If, however, an appealable issue is omitted as a result of the performance of counsel whose competence fell below that required of attorneys in criminal cases then appellant's counsel is constitutionally ineffective.

Briones v. State, 74 Haw. 442, 466-67, 848 P.2d 966, 978 (1993)
(footnotes omitted).

DISCUSSION

A.

The circuit court did not err in determining that Rivera failed to state a colorable claim of ineffective assistance of counsel by Roberts or Ostendorp. HRPP Rule 40(a)(3) provides:

INAPPLICABILITY. Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. Except for a claim of illegal sentence, an issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

See also Stanley v. State, 76 Hawai'i 446, 450-51, 879 P.2d 551, 555-56 (1994).

The issue of whether Rivera received ineffective assistance of counsel from Roberts was raised in Rivera's motion to withdraw guilty plea and on direct appeal to the Hawai'i Supreme Court. Rivera, SDO at 2-3. Therefore, the circuit court correctly concluded that the issue of ineffective assistance by Roberts was previously ruled upon.

The issues of Ostendorp's ineffective assistance of counsel for failing to promptly withdraw as counsel and Ostendorp's conflict of interest due to the employer-employee relationship with Roberts were not raised on direct appeal and were therefore presumptively waived. Rivera did not rebut the presumption that he knowingly and understandingly failed to raise these issues in his direct appeal. The circuit court therefore correctly concluded that Rivera failed to rebut the presumption that he knowingly and understandingly waived these arguments.

B.

The issue of Ostendorp's ineffective assistance of counsel for failing to file a motion to withdraw a guilty plea was raised in Rivera's direct appeal and was previously ruled on.

The circuit court did partly err in holding that Rivera waived his claim of ineffective assistance of counsel against Ishibashi. In determining that Rivera had waived his claim that Ishibashi was ineffective because Rivera failed to raise the claim on direct appeal, the circuit court did not consider that Ishibashi was Rivera's counsel during the proceedings on Rivera's motion to withdraw his guilty plea and on appeal. Where a defendant is represented by the same counsel on appeal as in the prior proceeding, the failure of appellate counsel to raise a claim of ineffective assistance of counsel on appeal against himself or herself in the prior proceeding does not constitute a waiver of the claim. Matsuo v. State, 70 Haw. 573, 577, 778 P.2d 332, 334 (1989). The circuit court's error, however, was harmless.

Rivera argued in his Rule 40 petition that Ishibashi was ineffective because Ishibashi (1) failed to adequately argue on appeal that Roberts' imminent suspension constituted a constructive ineffectiveness of counsel, and (2) delayed in filing the motion to withdraw guilty plea. The first argument is not supported by the law, and the second is not supported by the facts.

Rivera's first claim that Ishibashi was ineffective is based on the contention that Ishibashi should have argued that Roberts' imminent suspension created an inference that Roberts was "unlikely to [examine] the discovery with the objective of prevailing at trial" and made Roberts more "inclined to rationalize that the evidence favored a change of plea." Rivera cites no evidence supporting such inferences and no authority to suggest that such inferences are warranted. Instead, Rivera cites to a series of cases which all stand for the proposition that there is no per-se rule that an attorney is ineffective because he or she has been suspended from the practice of law. United States v. Hoffman, 733 F.2d 596, 599 (9th Cir. 1984);

United States v. Mouzin, 785 F.2d 682, 696-97 (9th Cir. 1986); Waterhouse v. Rodriguez, 848 F.2d 375, 383 (2d Cir. 1988); In re Johnson, 822 P.2d 1317, 1322 (Cal. 1992); United States v. Ross, 338 F.3d 1054, 1056 (9th Cir. 2003).

Rivera also cites to Solina v. United States, 709 F.2d 160 (2d Cir. 1983), which is factually distinguishable. In the present case, Roberts was licensed to practice law at the time he represented Rivera. The Solina decision was limited to situations where the person acting as counsel had not passed the bar. Id. at 167. The second circuit has refused to expand Solina beyond its factual setting. Waterhouse, 848 F.2d at 383.

The focus of a claim of ineffective assistance of counsel remains the quality of assistance actually provided. See Mouzin, 785 F.2d at 696-97.

In any case, as we observed in Hoffman and Mouzin, the actual effects of any such doubts are appropriately addressed under the same rubric generally applicable to claims of ineffective assistance of counsel: the test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), actual deficient performance plus prejudice. Strickland, 466 U.S. at 687, 104 S. Ct. 2052.

Ross, 338 F.3d at 1056. Because Roberts' imminent suspension did not, per se, result in ineffective assistance of counsel, Ishibashi's failure to raise that argument on appeal was not ineffective assistance. The issue of the quality of Roberts' representation of Rivera was previously addressed on direct appeal.

The claim that Ishibashi was ineffective because of the delay in filing the motion to withdraw guilty plea is not supported by the facts. The circuit court found, with respect to Rivera's motion to withdraw guilty plea, that Rivera was not credible, he was "attempting to manipulate the criminal justice system[,] and the "delay in bringing this Motion to Withdraw Guilty Plea was to gain a tactical advantage over the State." The circuit court, in the order denying the Rule 40 petition, found that "[t]he Petition and Supplemental Petitions 1 and 2 are a ruse to again litigate the denial of the 'Motion to Withdraw Guilty Plea' and another attempt to manipulate the criminal

justice system." The factual determinations of the circuit court in the order denying the motion to withdraw guilty plea and the order denying the Rule 40 petition affirmatively determined that the delay was an effort by Rivera to manipulate the system. Such a finding would be inconsistent with a determination that the delay was the result of ineffective assistance of counsel. Although Rivera argues that there was some evidence that he wanted the motion to withdraw guilty plea to be filed by Ostendorp, the circuit court's contrary determination was not clearly erroneous.

Rivera's claim that Ishibashi was ineffective due to his failure to argue that Roberts' pending suspension made him ineffective is not supported by the law, and Rivera's claim that Ishibashi was ineffective for delaying the filing of the motion to withdraw guilty plea is not supported by the facts. Therefore, there is no reasonable possibility that the circuit court's error in concluding that Rivera had waived the issue of Ishibashi's ineffective assistance of counsel might have contributed to the adverse result. The circuit court's erroneous conclusion that Rivera had waived his claims of Ishibashi's ineffective assistance of counsel was therefore harmless error. See State v. Kassebeer, 118 Hawai'i 493, 505, 193 P.3d 409, 421 (2008).

Therefore,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Order Granting Motion to Dismiss Petition for Post-Conviction Relief and Supplemental Petitions filed on January 28, 2008 by the circuit court is affirmed.

DATED: Honolulu, Hawai'i, June 30, 2009.

On the briefs:

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