

NO. 29075

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

RUDY TABIOS, Petitioner-Appellant, v.  
STATE OF HAWAII, Defendant-Appellee

E.M. RIMANDO  
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STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(S.P.P. NO. 07-1-0047; CRIMINAL NO. 92-0004)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Rudy M. Tabios (**Tabios**) appeals the "Order Denying Second Successive Petition to Exhaust State Remedies Pursuant to Hawaii Rules of Penal Procedure Rule 40," (**Order**) filed on February 20, 2008, in the Circuit Court of the First Circuit (**Circuit Court**).<sup>1/</sup>

On September 18, 1992, Tabios was convicted of Murder in the Second Degree in violation of Hawaii Revised Statutes (**HRS**) § 707-701.5(1) (1993). On October 19, 1992, Tabios filed a Notice of Appeal. On July 15, 1993, Tabios stipulated to the dismissal of his appeal.

In 1995, in S.P.P. No. 95-0025, Tabios filed a Petition for Post-Conviction Relief (**First Petition**) pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure (**HRPP**) alleging: (1) ineffective assistance of appellate counsel for failure to file an opening brief; (2) the stipulation to dismiss appeal was not made intelligently or with knowledge of the consequences; (3) the Circuit Court erred in failing to define "Manslaughter" upon the request of the jury; and (4) ineffective assistance of trial counsel. On December 29, 1995, the Circuit Court denied the

<sup>1/</sup> The Honorable Dexter D. Del Rosario presided.

First Petition. On August 12, 1997, this court affirmed the denial of Tabios's First Petition in No. 19623.

On November 13, 2007, Tabios filed a "Second Successive Petition to Exhaust State Remedies Pursuant to Hawai'i Rules of Penal Procedure Rule 40," (**Second Petition**). On February 20, 2008, the Circuit Court issued its Order denying Tabios's Second Petition without a hearing.

On appeal, Tabios contends that: (1) the Circuit Court erred when it denied the Second Petition without a hearing; (2) the Circuit Court denied Tabios "his 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, and 14<sup>th</sup> Amendment to the U.S. Constitution" when it "denied him the right to his 'First Appeal' as a right;" (3) the Circuit Court denied Tabios "his 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup> Amendment to the U.S. Constitution when they denied him his Speedy Trial Rights;" (4) Tabios was denied effective assistance of counsel during trial and on appeal; and (5) Tabios was entitled to a lesser-included instruction when the jury asked for clarification.

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 Tabios's points of error as follows:

(1) The Circuit Court did not err by denying Tabios's Second Petition for the reasons discussed below.

(2) In No. 19623, this court held that "Tabios knowingly, intelligently and voluntarily waived his right to appeal." Therefore, the issue of whether Tabios was denied his right to appeal was previously ruled upon and relief pursuant to HRPP Rule 40 is not available. HRPP Rule 40(a)(3).

(3) Tabios did not raise the issue of a violation of his speedy trial rights at trial, in a direct appeal, or in his First Petition. Tabios has failed to demonstrate the existence of the extraordinary circumstances necessary to rebut the presumption that he knowingly waived this issue. Therefore,

relief pursuant to HRPP Rule 40 is not available. HRPP Rule 40(a)(3).

(4) Tabios's claim that his appellate counsel was ineffective for failing to file an Opening Brief was previously ruled upon in No. 19623. Therefore, the issue of whether Tabios was denied effective assistance of appellate counsel was previously ruled upon, and relief pursuant to HRPP Rule 40 is not available. HRPP Rule 40(a)(3).

Tabios asserted a claim of ineffective assistance of trial counsel in the First Petition; the issue was ruled upon by the Circuit Court in S.P.P. 95-0025. Tabios did not appeal the denial of that claim in No. 19623. In his Second Petition, Tabios claimed his trial counsel was ineffective for failing to inform him of a plea agreement or for failing to request a plea agreement. In this appeal, Tabios again claims that his trial counsel was ineffective but does not assert that his trial counsel was ineffective for failing to inform him of a plea agreement or for failing to request a plea agreement. We conclude that Tabios's claim for ineffective assistance of trial counsel was previously ruled upon and/or it is waived. HRPP Rule 40(a)(3); HRAP Rule 28(b)(4).

(5) Tabios's claim that the trial court erred by refusing to define the term "Manslaughter" upon request by the jury was previously ruled upon in No. 19623. Therefore, relief pursuant to HRPP Rule 40 is not available. HRPP Rule 40(a)(3).

For these reasons, the Circuit Court's February 20, 2008 Order is affirmed.

DATED: Honoulu, Hawai'i, April 15, 2009.

On the briefs:

Rudy Tabios  
Petitioner-Appellant

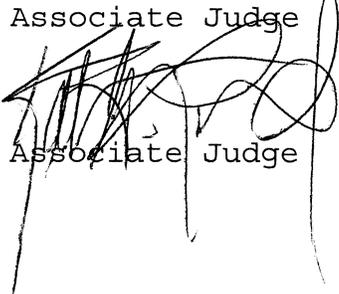
Loren J. Thomas  
Deputy Prosecuting Attorney  
for Respondent-Appellee

*Man Heamald*

Chief Judge

*Corinne K. Watanebe*

Associate Judge

  
Associate Judge