

NO. 29240

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

LARRY JAMES ORTIZ, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

Jean K. NORMAN, T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 07-1-0051 (Cr. No. 88-0459))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Larry James Ortiz (Ortiz) appeals from the Findings of Fact, Conclusions of Law, and Order Denying Hearing on Petition for Post-Conviction Relief (Order) filed on May 2, 2008, in the Circuit Court of the First Circuit (circuit court).¹ Ortiz filed his Petition for Post-Conviction Relief (Rule 40 Petition) on November 20, 2007 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

On appeal, Ortiz contends his extended sentences are (1) void ab initio and (2) illegal under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007).

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

(1) Ortiz did not state in his Rule 40 Petition that his extended sentences were void ab initio. Therefore, the point of error is waived. Hawai'i Rules of Appellate Procedure Rule 28(b)(4). Even if the point were not waived, Ortiz's extended

¹ The Honorable Derrick H. M. Chan presided.

sentences are not void ab initio. State v. Jess, 117 Hawai'i 381, 402, 184 P.3d 133, 154 (2008); Loher v. State, 118 Hawai'i 522, 537-38, 193 P.3d 438, 453-54 (App. 2008), cert. dismissed, 2009 WL 2386283 (Aug. 5, 2009).

(2) Ortiz's extended sentences are not illegal because Maugaotega and Apprendi do not apply retroactively to his extended sentences. Carrington v. United States, 503 F.3d 888, 893 (9th Cir. 2007); Loher, 118 Hawai'i at 537-38, 193 P.3d at 453-54. Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079 (1949), did not dictate the rule announced in Apprendi, see Loher, 118 Hawai'i at 537-38, 193 P.3d at 453-54, and In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970), and Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881 (1975), are inapplicable because Maugaotega and Apprendi do not apply retroactively to Ortiz's extended sentences.

Therefore,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Order Denying Hearing on Petition for Post-Conviction Relief filed on May 2, 2008 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, September 25, 2009.

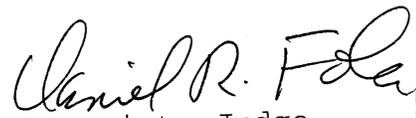
On the briefs:

Larry James Ortiz,
Petitioner-Appellant pro se.

Brian R. Vincent,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent-Appellee.


Chief Judge


Associate Judge


Associate Judge