

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 29363

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

BRYANT K. WHITBY, JR., Petitioner-Appellant
STATE OF HAWAI'I, Respondent-Appellee

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2009 JUL 15 AM 8:02

FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. No. 08-1-0003(2))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Bryant K. Whitby, Jr. (Whitby) appeals from the "Findings of Fact, Conclusions of Law, and Judgment Denying [Whitby's Third Hawai'i Rules of Penal Procedure (HRPP)] Rule 40 [(2006)] Petition for Post-Conviction Relief" (judgment) entered by the Circuit Court of the Second Circuit (circuit court)¹ on August 26, 2008.

In the HRPP Rule 40 petition underlying this appeal, Whitby alleged, in summary, that he was entitled to relief, based on the following grounds:

(1) Whitby's extended sentence was a nullity because it was based on Hawaii Revised Statutes (HRS) § 706-662 (Supp. 1996), which was determined to be unconstitutional in State v. Mauqaoteqa, 115 Hawai'i 432, 168 P.3d 562 (2007), and is therefore void ab initio.

(2) Whitby's extended sentence was illegal pursuant to State v. Kamana'o, 103 Hawai'i 315, 82 P.3d 401 (2003), which held that it was improper for a judge to sentence a defendant to an extended term for failing to admit guilt.

(3) Whitby's extended sentence was illegal because he was not given a psychiatric or psychological evaluation to

¹ The Honorable Shackley F. Raffetto presided.

determine whether he was a dangerous person, as required by HRS § 706-662(3).

(4) Whitby was illegally convicted because the jury was not given an instruction on the lesser-included offense of sexual assault in the second degree although the complaining witness had "mental problems" and was mentally incapacitated under HRS § 707-731(b) (1993).

(5) Respondent-Appellee State of Hawai'i (State) failed to prove beyond a reasonable doubt that Whitby committed penetration, however slight.

(6) Whitby should have been allowed to be sentenced pursuant to HRS § 706-606.3 (1993) because he and the complaining witness and her entire family resided in the same dwelling.

HRPP Rule 40, entitled "POST-CONVICTION PROCEEDING[,]" states, in relevant part:

POST-CONVICTION PROCEEDING.

(a) Proceedings and grounds. . . .

. . . .

(3) **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.

. . . .

(f) Hearings. If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a 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. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which

led to the judgment or custody which is the subject of the petition or at any later proceeding.

The petitioner shall have a full and fair evidentiary hearing on the petition. The court shall receive all evidence that is relevant and necessary to determine the petition, including affidavits, depositions, oral testimony, certificate of any judge who presided at any hearing during the course of the proceedings which led to the judgment or custody which is the subject of the petition, and relevant and necessary portions of transcripts of prior proceedings. The petitioner shall have a right to be present at any evidentiary hearing at which a material question of fact is litigated.

Where the petition alleges the ineffective assistance of counsel as a ground upon which the requested relief should be granted, the petitioner shall serve written notice of the hearing upon the counsel whose assistance is alleged to have been ineffective and said counsel shall have an opportunity to be heard.

In denying Whitby's Rule 40 petition without a hearing, the circuit court determined that the grounds alleged by Whitby either lacked merit, had no colorable basis, were without a trace of support in the record, were patently frivolous, were previously raised, or were waived.

On appeal, Whitby argues that (1) the circuit court erred in denying his Rule 40 petition without a hearing; (2) his "sentence was illegally imposed, based on a statute that has been deemed illegal since its first enactment, some thirty (30) plus years ago"; (3) his sentence was illegal pursuant to Kamana'o; (4) he was illegally sentenced under HRS § 706-662 because the circuit court called him a "danger to society" without providing him a three-panel hearing; (5) he was entitled to lesser-included-offense instructions under HRS § 707-731 because there was evidence on the record regarding the complaining witness's "mental handicap state"; (6) the State failed to prove "penetration however slight" to convict him; and (7) he should have been charged and sentenced pursuant to HRS § 706-606.3, the expedited sentencing statute.

Based on our review of the record and the briefs submitted by the parties, and having given due consideration to

the arguments advanced, issues raised, and the relevant statutes and case law, we resolve Whitby's points of error as follows:

(1) HRS § 706-662 is not void ab initio. See State v. Jess, 117 Hawai'i 381, 184 P.3d 133 (2008); and Loher v. State, 118 Hawai'i 522, 193 P.3d 438 (App. 2008). Therefore, Whitby's first point of error, that his extended sentence pursuant to HRS § 706-662, is illegal, is without merit and patently frivolous.

(2) There is no evidence in the record that the circuit court imposed an extended sentence on Whitby due to his refusal to admit guilt. The circuit court's comment that Whitby was unrepentant goes to the issue of remorse, which is a permissible factor that can be considered in sentencing under Kamana'o. Therefore, Whitby's second point of error is without merit and patently frivolous.

(3) The State moved to sentence Whitby to an extended sentence as a multiple offender pursuant to HRS § 706-662(4) and not as a "dangerous person" pursuant to HRS § 706-662(3). Therefore, Whitby's third point of error, that he did not receive a psychiatric or psychological evaluation as required under HRS § 706-662(3), is without merit and patently frivolous.

(4) Any error in the circuit court's failure to provide an appropriate lesser-included-offense jury instruction is harmless when the defendant is convicted of the greater offense. State v. Haanio, 94 Hawai'i 405, 415-16, 16 P.3d 246, 256-57 (2001). Therefore, Whitby's fourth point of error is without merit. Moreover, Whitby waived this issue by not raising it in his direct appeal or in his prior HRPP Rule 40 petitions.

(5) The Hawai'i Supreme Court previously ruled upon Whitby's claim of sufficiency of the evidence in Whitby's direct appeal in supreme court No. 20457. Even if the supreme court had not previously ruled upon the issue, the issue was waived because Whitby provided no justification as to why the issue could not have been raised in his direct appeal or in his first and second HRPP Rule 40 petitions.

(6) Whitby did not have any right under HRS § 706-606.3 to be sentenced under the expedited sentencing program. Therefore, this claim lacks merit and is patently frivolous.

(7) Because the claims for relief alleged by Whitby in his underlying HRPP Rule 40 petition were patently frivolous, previously ruled on, or waived, the circuit court did not err in denying the petition without conducting an evidentiary hearing.

Now, therefore,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Judgment Denying Rule 40 Petition for Post-Conviction Relief filed on August 26, 2008 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 15, 2009.

On the briefs:

Bryant K. Whitby, Jr.,
Petitioner-Appellant, pro se.

Kristin Coccaro,
Deputy Prosecuting Attorney,
County of Maui,
for Respondent-Appellee.

Corinne K. C. Watanabe
Alicia M. Fujim
[Signature]