

NO. 27395

IN THE SUPREME COURT OF THE STATE OF HAWAII

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WILLIAM A. CORNELIO, III, Petitioner-Appellant

vs.

STATE OF HAWAII, Respondent-Appellee.

APPEAL FROM THE SECOND CIRCUIT COURT  
(SPP NO. 05-1-0014)  
(CR. NO. 94-0590)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Petitioner/defendant-appellant William A. Cornelio, III, appearing pro se, appeals from the Circuit Court of the Second Circuit's<sup>1</sup> June 21, 2005 order denying Cornelio's second Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief [hereinafter, Petition II]. In Petition II, Cornelio essentially asserted that the trial court presiding over his jury trial failed to instruct the jury that, in order to convict him of multiple offenses, the jury was required to find that Cornelio acted with "separate and distinct intents."

On appeal, Cornelio contends that the circuit court erred in denying Petition II without affording him a hearing inasmuch as he had stated a colorable claim for relief.

<sup>1</sup> The Honorable Shackley F. Raffetto presided over the underlying proceedings.

Specifically, Cornelio argues that (1) the trial court failed to give a "separate and distinct intents" instruction to the jury and (2) he was denied effective assistance of trial and appellate counsel because (a) trial counsel failed to request the foregoing jury instruction and (b) appellate counsel failed to challenge on direct appeal the trial court's failure to instruct the jury.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the parties' contentions as follows.

(1) Cornelio asserts that the "trial court should have instructed the jury that[,] in order to convict [Cornelio] of multiple offenses[,] the jury was required to find that [Cornelio] acted with 'seperate [sic] and distinct intents.'"

HRPP Rule 40(a)(3) provides:

(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.

(Capital letters in original.) (Emphases added.)

In the instant case, the issue whether the trial court should have instructed the jury on "separate and distinct intents" "could have been raised" at the trial, on appeal, or in

a prior proceeding actually initiated under HRPP Rule 40, i.e., the proceeding on Cornelio's first HRPP Rule 40 petition for post-conviction relief [hereinafter, Petition I]. Inasmuch as Cornelio failed (1) to raise the issue whether the trial court should have instructed the jury on "separate and distinct intents" at the trial, on appeal, or in Petition I, (2) to present any facts to rebut the presumption that the failure to raise that issue was made knowingly and understandingly, and (3) to prove the existence of extraordinary circumstances to justify his failure to raise the issue, Cornelio has waived the issue for purposes of Petition II. See Stanley v. State, 76 Hawai'i 446, 451, 879 P.2d 551, 556 (1994).

(2) Cornelio next asserts that he was denied effective assistance of trial and appellate counsel. With respect to the issue of ineffective assistance of trial counsel, however, Cornelio failed to specify this allegation as a ground for relief in Petition II. Although "failure to raise a[n HRPP] Rule 40 issue specifically in the petition does not per se defeat the possibility of obtaining relief on that ground in the Rule 40 proceeding," a pro se petitioner "still must alert the court to the general issue that is the basis of his claim of ineffective assistance of counsel." Stanley, 76 Hawai'i at 450-51, 879 P.2d at 555-56 (citing Bryant v. State, 6 Haw. App. 331, 335, 720 P.2d 1015, 1019 (1986), disapproved on other grounds by Briones v. State, 74 Haw. 442, 848 P.2d 966 (1993)). Here, however, Cornelio did not alert the circuit court to the general issue

that is the basis of his claim of ineffective assistance of trial counsel. In Petition II, there was no mention of the allegation that Cornelio now asserts on appeal, i.e., that he was denied effective assistance of trial counsel. Consequently, respondent/plaintiff-appellee State of Hawai'i (the prosecution) could not respond, and the circuit court never considered the issue. Because the "general rule is that an issue which was not raised in the [circuit] court will not be considered on appeal," Foo v. State, 106 Hawai'i 102, 114, 102 P.3d 346, 358 (2004) (internal quotation marks, brackets, and citation omitted), we need not address Cornelio's claim of ineffective assistance of trial counsel. See Stanley, 76 Hawai'i at 451, 879 P.2d at 556 (refusing to address the issue of erroneous exclusion of jury instructions when raised for the first time when appealing the denial of the petitioner's HRPP Rule 40 petition).

Nonetheless, even assuming arguendo that Cornelio "alerted" the circuit court to the general issue of ineffective assistance of trial counsel, such issue would have been waived. Although this court has previously stated that,

[w]here [the] petitioner has been represented by the same counsel both at trial and on direct appeal, no waiver of the issue of trial counsel's performance occurs because no realistic opportunity existed to raise the issue on direct appeal[.]

Briones, 74 Haw. at 459, 848 P.2d at 975 (citations omitted), in this case, Cornelio was not represented by the same counsel at trial and on direct appeal. In fact, Keith Tanaka, Cornelio's trial counsel, filed a motion to withdraw as counsel, which the

trial court subsequently granted, and Anthony Vierra, Cornelio's sentencing counsel, filed a motion to withdraw as counsel precisely because Cornelio indicated an interest to raise a claim of ineffective assistance of trial counsel. Consequently, Vickie Russell was appointed as Cornelio's counsel for his direct appeal. Thus, the issue sought to be raised in the instant appeal, i.e., whether trial counsel was ineffective in failing to request the "separate and distinct intents" jury instruction or failing to object to the trial court's failure to give such an instruction, could have been raised on direct appeal. Because Cornelio failed to present any facts to rebut the presumption that the failure to raise that issue was made knowingly and understandingly, and Cornelio has failed to prove the existence of extraordinary circumstances to justify his failure to raise the issue, Cornelio has waived the issue of ineffective assistance of trial counsel for purposes of Petition II. See State v. Ng, 105 Hawai'i 74, 78, 93 P.3d 1181, 1185 (App. 2004) (concluding that the petitioner's claim of ineffective assistance of trial counsel was waived for purposes of his HRPP Rule 40 petition because he did not raise such a claim in his direct appeal and he was not represented by the same counsel at trial and on direct appeal).

With respect to Cornelio's claim of ineffective assistance of appellate counsel, such claim is likewise waived. Cornelio had a "realistic opportunity" to raise his claim of ineffective assistance of appellate counsel in Petition I.

Although Cornelio was represented by Vickie Russell on the appeal of Petition I, Cornelio filed Petition I pro se and appeared pro se throughout the entire circuit court proceedings. Thus, Russell's appointment as Petition I appellate counsel did not deprive Cornelio of a realistic opportunity to present his ineffective assistance of appellate counsel claim in Petition I. Inasmuch as Cornelio failed to present any facts to rebut the presumption that the failure to raise the issue whether appellate counsel was ineffective was made knowingly and understandingly, and Cornelio has failed to prove the existence of extraordinary circumstances to justify his failure to raise the issue, Cornelio has waived the issue of ineffective assistance of appellate counsel for purposes of Petition II.

Thus, based on the foregoing, Cornelio has waived the issues sought to be raised in Petition II. Accordingly, we hold that the circuit court did not err in dismissing Cornelio's Petition II pursuant to HRPP Rule 40(g)(2). Therefore,

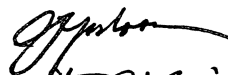
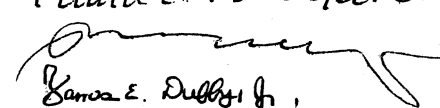
IT IS HEREBY ORDERED that the circuit court's June 21, 2005 order denying Cornelio's Petition II is affirmed.

DATED: Honolulu, Hawai'i, November 6, 2006.

On the briefs:

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