

*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 26339

IN THE SUPREME COURT OF THE STATE OF HAWAII

CALVIN FLOURNOY, JR., Petitioner-Appellant

vs.

STATE OF HAWAII, Respondent-Appellee.

APPEAL FROM THE SECOND CIRCUIT COURT
(S.P.P. NO. 03-1-0011)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ.
and Acoba, J., concurring with whom Duffy, J., joins)

Defendant-Appellant Calvin Flournoy, Jr. ("Flournoy"), appeals from the second circuit court's¹ Order filed on December 29, 2003, denying his "[Hawai'i Rules of Penal Procedure ("HRPP") Rule] 40 Petition to Vacate, Set Aside or Correct Illegal Sentence."

On appeal, Flournoy argues that the circuit court erred in denying his petition inasmuch as: (1) the circuit court's imposition of four consecutive twenty-year terms was not based upon findings of fact made by a jury, in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000); (2) his conviction of four counts of Sexual Assault in the First Degree violated his protection against double jeopardy; (3) defense counsel rendered ineffective assistance by failing to investigate the charges brought against him; (4) his privilege against self-incrimination was violated inasmuch as he was under the influence of drugs when he pled no contest; and (5) the circuit court's imposition of four consecutive twenty-year terms breached his plea agreement.

Upon carefully reviewing the record and the briefs

submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold as follows:

(1) The imposition of consecutive terms of imprisonment based upon facts not found by a jury did not violate Flournoy's sixth amendment right to a jury trial. A court may order consecutive rather than concurrent terms without infringing upon a defendant's sixth amendment right to a jury trial. State v. Kahapea, 111 Hawai'i 267, 280, 141 P.3d 440, 453 (2006) (holding that Defendant-Appellant's five ten-year terms of imprisonment running consecutively does "not deprive him of his right to a jury trial as interpreted by the United States Supreme Court in Apprendi and Blakely [v. Washington, 542 U.S. 296 (2004)]");

(2) Flournoy previously alleged in his first Rule 40 petition that (a) the prosecution violated his protection against double jeopardy, (b) he received ineffective assistance from his defense counsel, and (c) his privilege against self-incrimination was violated. The circuit court denied that petition on January 7, 2003 and he did not appeal the denial of that Order. Therefore, these claims were ruled on, and, under Rule 40(a)(3),² he was not entitled to raise the same claims in his second HRPP 40 petition; and

(3) The circuit court's imposition of four consecutive twenty-year terms did not breach the plea agreement inasmuch as the circuit court was not bound by the terms of the plea

² HRPP Rule 40(a)(3) (1993) provides, in pertinent part, "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."

agreement,³ and the record does not reflect that the prosecution breached the plea agreement during Flournoy's sentencing proceeding. Therefore,

IT IS HEREBY ORDERED that the circuit court's December 29, 2003 Order denying Flournoy's HRPP Rule 40 petition is affirmed.

DATED: Honolulu, Hawai'i, November 1, 2007.

On the briefs:
Calvin Flournoy Jr.,
Defendant-Appellant pro se



Artemio C. Baxa,
Deputy Prosecuting Attorney,
for Plaintiff-Appellee
State of Hawai'i



CONCURRENCE BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

I concur in the result only.



James E. Duffy, Jr.

³ See HRPP Rule 11(e)(1) (1993) ("The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.") (Emphasis added.).