

NO. 24329

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

JOHN ORVILLE NOBLE, Petitioner-Appellant, v.  
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(S.P.P. No. 00-1-0012-(2))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant John Orville Noble (Noble) appeals from the order entered on May 3, 2001 by the Circuit Court of the Second Circuit (the circuit court), Judge Shackley F. Raffetto presiding, dismissing his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief without conducting an evidentiary hearing. In the petition, Noble sought to set aside a January 8, 1998 Judgment (the Judgment), convicting and sentencing him, following a jury trial, of one count of Assault in the Second Degree and three counts of Terroristic Threatening in the First Degree, on grounds that he had been deprived of his constitutional right to the effective assistance of trial counsel.

Specifically, Noble alleged that his trial counsel was ineffective because he did not:

(1) Call witnesses who would have testified regarding Noble's character for peacefulness and nonviolence;

(2) Conduct an adequate investigation before trial in that he did not find a particular witness who allegedly would have provided testimony favorable to Noble;

(3) Find a laboratory that could have detected fingerprints on the board allegedly used in the assault;

(4) Object when witnesses testified without foundation that a substance on that board was blood; and

(5) Timely subpoena the numerous arrest records and convictions of the complaining witnesses.

HRPP Rule 40(a)(3) states:

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. An issue is waived if the petitioner knowingly and understandably 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.

Our review of the record in this case confirms the circuit court's determination that all of Noble's claims of ineffective assistance of counsel were previously ruled upon by the Hawai'i Supreme Court during Noble's direct appeal from the

Judgment or were waived by Noble when he failed to properly raise the claims during his direct appeal.<sup>1</sup>

Accordingly, upon careful review of the record and the briefs submitted by the parties, and after duly considering and analyzing the law relevant to the arguments advanced and issues raised by the parties, we affirm the circuit court's order dismissing Noble's HRPP Rule 40 petition.

DATED: Honolulu, Hawai'i, January 23, 2003.

On the briefs:

Kyle B. Coffman for  
petitioner-appellant.

Tracy A. Jones, Deputy  
Prosecuting Attorney, County of  
Maui, for respondent-appellee.

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<sup>1/</sup> The record reflects that Petitioner-Appellant John Orville Noble (Noble) was represented by different attorneys at his trial and on his direct appeal. Therefore, Noble clearly had the opportunity to raise the ineffective assistance of trial counsel claims on direct appeal and his failure to do so constitutes a waiver of those claims.