

NOT FOR PUBLICATION

NO. 25797

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
PAUL P. REYES, III, aka Platon S.
Reyes, Defendant-Appellant,
and LUCIO MARCUS DELA CRUZ, Defendant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 52286)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Paul P. Reyes, III, aka Platon S. Reyes (Reyes) appeals from the "Decision and Order Denying Defendant's Consolidated Motion for Correction of Illegal Sentence and Appointment of Counsel" filed on March 31, 2003 in the Circuit Court of the First Circuit (circuit court)¹ pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35.

On appeal, Reyes contends that (1) the circuit court erred in denying his motion for correction of illegal sentence pursuant to HRPP Rule 35 based on the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000); (2) the circuit court misinterpreted Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989), by holding that

¹ The Honorable Richard K. Perkins presided.

Apprendi was not retroactively applicable to Reyes' case; and (3) the circuit court erred by denying Reyes' motion for appointment of counsel.

Upon careful review of the record and the briefs submitted by the parties, we hold that:

(1) Reyes was not entitled to a jury determination because Apprendi does not apply retroactively to this case since new rules for the conduct of criminal prosecutions as in Apprendi only apply retroactively to cases "pending on direct review or not yet final." Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 716 (1987). A judgment becomes final for purposes of retroactivity analysis "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." Caspari v. Bohlen, 510 U.S. 383, 390, 114 S. Ct. 948, 953 (1994). "Apprendi does not apply retroactively to cases on initial collateral review." United States v. Sanchez-Cervantes, 282 F.3d 664, 671 (2002).²

(2) Reyes was not entitled to counsel.

We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no

² The Amended Judgment was filed on May 16, 1980, and Reyes withdraw his appeal from the Amended Judgment on November 27, 1981.

further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. . . . [C]ounsel may be appointed in post conviction proceedings at the discretion of the court.

State v. Levi, 102 Hawai'i 282, 288, 75 P.3d 1173, 1179 (2003) (citations omitted; block quote format changed). The circuit court did not abuse its discretion by not appointing counsel in this post-conviction proceeding.

Therefore,

IT IS HEREBY ORDERED that the "Decision and Order Denying Defendant's Consolidated Motion for Correction of Illegal Sentence and Appointment of Counsel" filed on March 31, 2003 is affirmed.

DATED: Honolulu, Hawai'i, December 28, 2004.

On the briefs:

Paul P. Reyes,
defendant-appellant pro se.

Alexa D.M. Fujise,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge