

NOT FOR PUBLICATION

NO. 27277

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

WESLEY K. P. KEAHI, Petitioner-Appellant, v
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 05-1-0006(2) (Cr. No. 93-0007(3)))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Wesley K. P. Keahi (Keahi) appeals from the "Order Denying, Without Evidentiary Hearing, Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" (Order) filed on April 18, 2005 in the Circuit Court of the Second Circuit^{1/} (circuit court). Keahi filed his Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody (Rule 40 Petition) on March 8, 2005 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, Keahi had been found guilty by a jury of Count II, Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(c) (Supp. 1991). The circuit court had sentenced Keahi to an extended term of imprisonment of twenty years, with a mandatory minimum of six years and eight months without

^{1/} The Honorable Shackley F. Raffetto presided.

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possibility of parole. On January 14, 2002, Keahi had been released on parole.

On July 1, 2002, pursuant to Act 161, the amendments to HRS § 353-66 took effect, providing in part that "[p]arole shall not be revoked for a first violation of the terms and conditions of parole involving possession or use . . . of any dangerous drug . . .; provided that the person shall be required to undergo and complete a drug treatment program as a condition of continued parole." 2002 Haw. Sess. L. Act 161, § 4 at 572-73; HRS § 353-66(f) (Supp. 2002).

On July 1, 2004, the legislature's amendments to HRS § 353-66(f), pursuant to Act 44, took effect, deleting the language concerning a "first violation" and making a drug treatment program discretionary after "a violation of the terms and conditions of parole involving possession or use . . . of any dangerous drug." 2004 Haw. Sess. L. Act 44, § 10 at 213; HRS § 353-66(f) (Supp. 2004). However, Act 44 stated that it did "not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date" of July 1, 2004. 2004 Haw. Sess. L. Act 44, § 29 at 227.

Keahi violated his parole conditions by possessing methamphetamine and cocaine on April 26, 2004 and cocaine on May 11, 2004. Keahi was arrested, and at a hearing on July 9, 2004

before the Hawaii Paroling Authority (HPA), he pleaded guilty to violating the conditions of his parole as charged.

In his Rule 40 Petition, Keahi alleged that the HPA had violated Act 161 (2002), HRS § 353-66(f) (2004), and his liberty interest rights under Article I, §§ 2 and 5 of the Hawai'i Constitution when the HPA revoked his parole instead of sending him to drug treatment.

The HPA filed its answer on April 7, 2005. The HPA pointed out that Keahi had admitted violating the conditions of his parole by using cocaine and methamphetamine on two different occasions and the HPA had complied with HRS § 353-66(f) (2002).

In its Order, the circuit court ruled as a matter of law that Keahi's claim in his Rule 40 Petition was "patently frivolous and without a trace of support either in the record or from other evidence" submitted by Keahi, and the court denied the Rule 40 Petition without a hearing. Keahi timely appealed.

On appeal, Keahi contends: (1) HRS § 353-66(f) creates a liberty interest when the HPA does not follow the criteria set forth in § 353-66(f); (2) "the legislative intent in enacting Act 44 section 10 is subservient to section 9 of Act 44 of session laws of Hawaii twenty-second state legislature of 2004"; and (3) the circuit court abused its discretion in misinterpreting the statute in question.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that Keahi's contentions are without merit. The HPA followed HRS § 353-66(f) (2002) in revoking Keahi's parole after his second, not first, parole violation.

Therefore,

The "Order Denying, Without Evidentiary Hearing, Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" filed on April 18, 2005 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 26, 2006.

On the briefs:

Wesley K.P. Keahi,
Petitioner-Appellant pro se.

Lisa M. Itomura and
Bryan C. Yee,
Deputy Attorneys General,
for Respondent-Appellee.



Acting Chief Judge



Associate Judge



Associate Judge