

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 27575

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

NEWTON ARCIGA, Petitioner-Appellant,
v.
STATE OF HAWAI'I, Respondent-Appellee

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(S.P.P. NO. 05-1-0004K)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Newton Arciga (Arciga) appeals from the October 11, 2005 Order Denying Hearing on Petition to Vacate, Set Aside or Correct Judgment or to Release Petitioner from Custody (October 11, 2005 Order).¹

On April 22, 2002, in FC-DA No. 02-1-086K, the family court entered a three-month order for protection in favor of Jennie Moore and against Arciga.

On September 25, 2002, Arciga was charged with having committed the following offenses on September 19, 2002: Count I, Abuse of Family and Household Member, Hawaii Revised Statutes (HRS) § 709-906(1) (Supp. 2002); Count II, Violation of an Order for Protection, HRS § 586-11 (Supp. 2002); Count III, Assault in the Second Degree, HRS § 707-711(1)(a) (1993); Count IV, Kidnapping, HRS 707-720(1)(d) and (e) (1993); Count V, Criminal

¹ Judge Elizabeth Strance presided.

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Property Damage in the Fourth Degree, HRS § 708-823(1) (1993); Counts VI and VII, Sexual Assault in the First Degree, HRS § 707-730(1)(a) (Supp. 2002); and Count VIII, Terroristic Threatening in the First Degree, HRS §§ 707-715(1) and 707-716(1)(d) (Supp. 2002). Jennie Moore was the alleged victim.

Represented by Deputy Public Defender Peter Bresciani (DPD Bresciani), Arciga entered into a plea agreement filed on December 9, 2002. Pursuant to the plea agreement, the court found Arciga guilty of Counts I, IV, VI, and VIII and sentenced him to two years of probation for Count I and five years of probation for Counts IV, VI, and VIII. The Judgment, entered on March 17, 2003, states, in relevant part:

SPECIAL CONDITIONS:

1. You shall be committed to the custody of the Director of the Dept. Of Public Safety for incarceration for a period of:
 - a) ONE (1) YEAR as to Counts IV, VI AND VIII
 - b) SIX (6) MONTHS as to Count ISaid terms to run concurrent with each other. You shall be given credit for time served of Five months, 14 days as of 3-10-2003.
.....
10. You shall pay a fee of \$450.00 to the Crime Victims Compensation fund and shall make minimum payments of \$25.00 per month beginning 60 days after your release from incarceration.
11. You shall obtain an assessment from Roxy Mico or Island Paradise Counseling and shall obtain a sex offender treatment through the Hawaii Sex Offender Treatment Program until clinically discharged.

On October 4, 2004, Respondent-Appellee State of Hawai'i (the State) filed a Motion for Revocation of Probation and to Resentence, and Application for Warrant of Arrest. In

this motion, the State alleged that Arciga violated special conditions 10 and 11 quoted above.

On March 31, 2005, after a hearing on March 30, 2005, the court entered an Order of Resentencing in which it found that Arciga "inexcusably failed to comply with a substantial requirement" of the March 17, 2003 Judgment and resentenced Arciga, with credit for time served, to the following concurrent terms of incarceration: one year for Count I; an indeterminate period of ten years for Count IV, and an indeterminate period of five years for Counts VI and VIII.

On March 31, 2005, DPD Bresciani filed a Motion to Reduce Sentence requesting that the sentences imposed on Arciga in the Order of Resentencing be changed to terms of probation. This motion stated that "[a] request for oral hearing on this motion will be filed at a later date."

On July 12, 2005, Arciga appeared before the Hawai'i Paroling Authority (HPA) at a hearing to determine the minimum sentences for Counts IV, VI and VIII. The HPA set all three minimum sentences at five years.

On September 14, 2005, Arciga filed a Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody (Rule 40 Petition), in which he asserted that (1) the court failed to credit him for time served of one year and seven months, (2) the five-year minimum sentence was excessive,

and (3) he was the victim of DPD Bresciani's ineffective assistance at all stages of the case and in determining the credit for the time served. He alleged that he "had served a one year sentencing of incarceration prior to being revoked [sic] on probation, and then was resentenced to incarceration and was not given credit for time already served by both the court or the [HPA]."

In a letter dated September 20, 2005, the HPA advised Arciga that

our records indicate that you were awarded 365 days of pre-sentence credits, which was factored in when determining the expiration of your minimum sentences (April 10, 2009), and longest maximum sentence (April 9, 2014). If the amount of pre-sentence awarded is in error, you must work with you[r] Institutional Case Manager and the staff of the Records Management office of the Halawa Correctional Facility (HCF) to resolve this matter.

The October 11, 2005 Order stated:

WHEREAS, the Court finds that [Arciga's] claims are patently frivolous and without a trace of support in the record or evidence submitted by [Arciga], Rule 40(f), Hawai'i Rules of Penal Procedure,

IT IS HEREBY ORDERED that a hearing on [Arciga's] Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody is DENIED.

On October 14, 2005, Arciga filed a document in which he asserted that the court failed to give him credit for "six months . . . time already served." In a response filed on October 19, 2005, the State noted that Arciga "has failed to allege that he actually served more than 365 days, and if so, when and has failed to show any effort to work with HCF as suggested by [the HPA]."

Arciga filed a Notice of Appeal on October 28, 2005.

Regarding the denial of a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition without an evidentiary hearing, HRPP Rule 40(f) provides in relevant part:

(f) *Hearings.* If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition or at any later proceeding.

Arciga argues that (1) a failure to credit him for time served resulted in an error in "determining the the [sic] expiration of [Arciga's] minimum sentencing terms of imprisonment" and (2) he "should be appointed counsel to assist him in the instant proceedings."

In the opening brief, Arciga states that

it is clear that [Arciga's] pre-sentence credits[]from the third circuit court were not factored into [Arciga's] minimum sentencing terms of imprisonment[]by the Hawaii Paroling Authority . . . therefore [Arciga] did not receive the due process of law in obtain[ing] his credits for time already served by the third circuit court as opposed to other inmates [who] . . . were sentenced by the court[.]

Upon careful review of the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised, we agree with the State that although Arciga alleged the conclusion that one or more mistakes in calculation were made, he did not allege any facts in support of that conclusion. In light of this failure, we conclude that

Arciga's Rule 40 Petition does not allege one or more facts that if proven would entitle Arciga to relief.

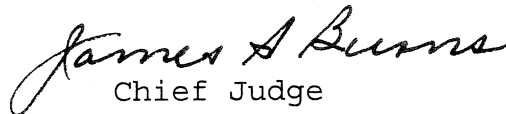
Therefore, IT IS HEREBY ORDERED that the October 11, 2005 Order Denying Hearing on Petition to Vacate, Set Aside or Correct Judgment or to Release Petitioner from Custody is affirmed.

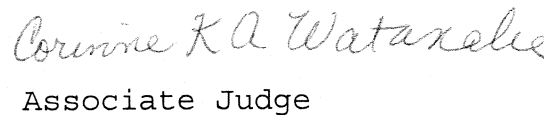
DATED: Honolulu, Hawai'i, December 11, 2006.

On the briefs:

Newton Arciga
Pro Se Petitioner-Appellant.

Linda L. Walton,
Deputy Prosecuting Attorney,
County of Hawai'i,
for Repondent-Appellee.


Chief Judge


Associate Judge


Associate Judge