

NO. 27648

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

JERRY RULEY, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP No. 05-1-0064 (Cr. No. 00-1-0548))

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Foley, and Nakamura, JJ.)

Petitioner-Appellant Jerry Ruley (Ruley) appeals from the November 3, 2005 order entered by the Circuit Court of the First Circuit (the circuit court),¹ denying, without a hearing, Ruley's Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief. We affirm.

In Criminal No. 00-1-0548, following a jury trial, the circuit court² convicted Ruley of Robbery in the First Degree (Count 1), Burglary in the First Degree (Count 2), and Kidnapping (Count 4). Ruley was sentenced to an: (1) extended term of life imprisonment with the possibility of parole on Count 1, with a mandatory minimum of fifteen years for commission of the offense with a firearm; (2) extended term of twenty years' imprisonment on Count 2; and (3) extended term of twenty years' imprisonment on Count 4, with a mandatory minimum of ten years. All sentence terms were to be served concurrently.

¹ The Honorable Dexter D. Del Rosario (Judge Del Rosario) presided.

² Judge Del Rosario presided.

Ruley appealed, contending that the circuit court plainly erred in sentencing him to extended terms of imprisonment and in admitting hearsay evidence at trial. On April 28, 2003, this court affirmed the Amended Judgment by Summary Disposition Order.

On October 6, 2005, Ruley filed his HRPP Rule 40 Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody (Petition) that underlies this appeal. Ruley raised four grounds in his Petition:

(1) Ruley was denied the effective assistance of counsel at trial because his trial counsel "failed to conduct independent analysis/comparison of fingerprint evidence and failed to consult with an independent fingerprint expert regarding [Respondent-Appellee State of Hawai'i's (the State)] fingerprint analysis and comparisons." Also, Ruley's trial counsel "failed to effectively represent [Ruley] during trial and at sentencing. [Ruley's] trial counsel failed to present exculpatory evidence and to adequately cross examine prosecution witnesses."

(2) "The trial court and the Hawaii Supreme Court deprived [Ruley] of his right to due process under the federal and state constitutions by permitting hearsay evidence of 'threats' against the complaining witnesses made by [Ruley's] employer. [Ruley] did not threaten the complaining witnesses and did not adopt his employer's 'threats.'"

(3) Ruley was denied the effective assistance of appellate counsel because his counsel failed to raise all viable issues on appeal. Specifically, Ruley's "appellate counsel did not challenge [Ruley's] extended term of imprisonment on Apprendi grounds."

(4) Ruley was improperly sentenced to an extended term of imprisonment because the trial court granted the State's motion for an extended term of imprisonment "without a jury finding that an extended term was necessary for the protection of the public."

On November 3, 2005, the circuit court denied Ruley's Petition without a hearing, concluding that Ruley's claim was "patently frivolous and is without a trace of support either in the record or from other evidence submitted by [Ruley] and therefore, has failed to state a claim upon which relief may be granted." This appeal followed.

The sole contention raised by Ruley on appeal is that the circuit court erred in denying his Petition without a hearing pursuant to HRPP Rule 40(f)³ because there was a colorable claim that his trial counsel was ineffective for failing to independently investigate fingerprint evidence that linked him to

³ HRPP Rule 40(f) (2006) provides, in relevant part:

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 offenses he was charged with and failing to call an expert witness to rebut the State's fingerprint analysis and comparison.

Based on our review of the record and the briefs submitted by the parties, and having given due consideration to the arguments presented and the applicable statutes and case law, we disagree with Ruley.

It is a well-established rule in Hawai'i that "[i]neffective assistance of counsel claims based on the failure to obtain witnesses must be supported by affidavits or sworn statements describing the testimony of the proffered witnesses." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998). Absent such affidavits or sworn statements, an uncorroborated claim of what a putative witness would have testified to "amounts to nothing more than speculation and . . . is insufficient to meet [the] burden of proving that . . . trial counsel's failure to subpoena [the putative witness] constituted constitutionally ineffective assistance of counsel". State v. Reed, 77 Hawai'i 72, 84, 881 P.2d 1218, 1230 (1994), overruled on other grounds by State v. Balanza, 93 Hawai'i 279, 1 P.3d 281 (2000). See also State v. Fukusaku, 85 Hawai'i 462, 481, 946 P.2d 32, 51 (1997).

In this case, Ruley did not attach to his Petition any affidavit or sworn statement of a fingerprint expert, describing what the fingerprint expert would have testified to at trial that would have rebutted the State's fingerprint evidence. Ruley's uncorroborated, self-serving speculation that his trial counsel's failure to investigate the fingerprint evidence might have

changed the result of the trial will not sustain an ineffective-assistance claim.

Moreover, the record indicates that there were eye witnesses who identified Ruley as the person who committed the offenses he was convicted of. Under the circumstances, it was understandable that Ruley's trial counsel would be reluctant to obtain the services of a fingerprint expert who might corroborate the State's fingerprint evidence.

In summary, we conclude that the circuit court did not err in failing to conduct a hearing to consider Ruley's fingerprint claim. Accordingly, we affirm the Order Denying Petition for Post-Conviction Relief filed on November 3, 2005.

DATED: Honolulu, Hawai'i, December 22, 2006.

On the briefs:

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