

NO. 26973

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

VERNON SILK, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

K. HANAKAHO
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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 03-1-0049 (Cr. No. 99-0677))

SUMMARY DISPOSITION ORDER

(By: Lim, Presiding Judge, Foley and Nakamura, JJ.)

Petitioner-Appellant Vernon Silk (Silk) appeals from the "Findings of Fact, Conclusions of Law, and Order Denying Grounds Three and Seven and Granting in Part and Denying in Part Ground One of Petitioner Vernon Silk's Petition for Post-Conviction Relief" filed on November 1, 2004 in the Circuit Court of the First Circuit.^{1/2/} Silk filed his Petition for Post-Conviction Relief (Rule 40 Petition) on November 18, 2003 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

^{1/} The Honorable Karen S. S. Ahn presided.

^{2/} Both the opening brief of Defendant-Appellant Vernon Silk (Silk) (see pages 1-5) and the answering brief of the State of Hawai'i (the State) (see pages 1-2) fail to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(3) by failing to cite in the Statement of the Case a record reference for each and every "statement of fact or mention of court . . . proceedings." Counsel for both Silk and the State are warned that future non-compliance with HRAP 28(b)(3) may result in sanctions against each of them.

In Cr. No. 88-1583,^{3/} Silk entered a no contest plea to thirteen counts of Fraudulent Use of Credit Card, Credit Card Theft, Theft in the Second Degree, and Forgery in the Second Degree. Silk was initially sentenced to probation, but failed to meet the conditions of his probation and was resentenced for concurrent terms of imprisonment of five years for each of the thirteen counts.

In Cr. No. 97-1727, Silk pled guilty to Unauthorized Control of a Propelled Vehicle, Carrying a Deadly Weapon, Promoting a Dangerous Drug in the Third Degree, and Unlawful Use of Drug Paraphernalia. The circuit court sentenced Silk to probation for three terms of five years and one term of one year, all terms to run concurrently. When Silk violated his terms of probation, the circuit court revoked his probation and resentenced him to imprisonment for the terms set forth above. The Hawai'i Paroling Authority (HPA) set Silk's minimum terms of imprisonment at five years for the drug paraphernalia, promoting in the third degree, and unauthorized use of vehicle convictions.

In the underlying case, Cr. No. 99-0677, a jury convicted Silk of two counts of Kidnapping and one count of Assault in the Third Degree. On October 12, 1999, the circuit court sentenced Silk to an extended term of life imprisonment

^{3/} This court takes judicial notice of the records and files in Cr. Nos. 88-1583, 97-1727, and 99-0677 and S. Ct. Nos. 22970 and 24431.

with the possibility of parole and a mandatory minimum term of imprisonment of six years and eight months for each of the Kidnapping convictions and one year of imprisonment for the assault conviction. Silk appealed, and in No. 22970, the Hawai'i Supreme Court vacated the judgment with regard to the two Kidnapping charges and remanded for a new trial. A jury convicted Silk of a merged, single count of Kidnapping, and on June 26, 2001, the circuit court sentenced him to twenty years of imprisonment with a mandatory minimum of six years and eight months as a repeat offender, said term to run consecutively to his sentence in Cr. No. 97-1727. On September 7, 2001, the HPA set Silk's minimum term of imprisonment at fifteen years. Silk appealed his conviction; on May 3, 2002, in No. 24431, the Hawai'i Supreme Court affirmed Silk's conviction and sentence. On June 9, 2003, the HPA issued a minimum term order that, pursuant to State v. Tauiliili, 96 Hawai'i 195, 29 P.3d 914 (2001), applied Silk's credit for time served only once against the aggregate total of his consecutive sentences.

In his Rule 40 Petition, Silk alleged:

GROUND ONE: The HPA's retroactive application of Tauiliili resulted in manifest injustice to Silk and the HPA improperly calculated his mandatory minimum term of imprisonment.

GROUND TWO: In Silk's appeal from Cr. No. 99-0677, his appellate counsel provided ineffective assistance of counsel by

failing to include as a point of error the circuit court's denial of Silk's Motion for Mental Evaluation of State's Witness.

GROUND THREE: The HPA arbitrarily and capriciously abused its discretion when it failed (a) to follow its own guidelines in setting Silk's minimum sentence, (b) to set Silk's level of punishment at Level II instead of Level III; and (c) to issue a written justification for its deviation from its guidelines, thereby violating Silk's due process rights under the Fourteenth Amendment to the United States Constitution and Article I, § 5, of the Hawai'i Constitution.

GROUND FOUR: Silk's appellate counsel provided ineffective assistance of counsel, violating Silk's rights under the Sixth Amendment to the United States Constitution and Article I, § 14, of the Hawai'i Constitution, when counsel failed to file a habeas corpus petition in the United States District Court for the District of Hawai'i.

GROUND FIVE: The circuit court illegally sentenced Silk to a mandatory minimum sentence of six years and eight months in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

GROUND SIX: Silk's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the Hawai'i Constitution were violated when he was shackled during trial and sentencing.

GROUND SEVEN: The ineffectiveness of Silk's counsel for both his trial in and appeal from Cr. No. 99-0677 violated his federal constitutional right to effective counsel.

On June 8, 2004, the circuit court dismissed Grounds Two, Four, Five, and Six of the Rule 40 Petition. On July 6, 2004, Silk submitted a Second Supplemental Memorandum in Support of His Claims, documenting his success in his prison programs; upon motion by the State, the circuit court struck the second supplemental memorandum as irrelevant.

On November 1, 2004, the circuit court issued its "Findings of Fact, Conclusions of Law, and Order Denying Grounds Three and Seven and Granting in Part and Denying in Part Ground One of Petitioner Vernon Silk's Petition for Post-Conviction Relief." The circuit court concluded that Silk was entitled to more credit for time served than the HPA had calculated, the HPA's determination that Silk was a Level III offender was correct, and the HPA should apply Silk's credit for time served only once against the aggregate of his consecutive sentences.

On appeal, Silk contends:

1. The circuit court improperly concluded that Silk was a Level III offender because he does not have three prior felony convictions; therefore, the circuit court should have concluded that he was a Level II offender.

2. The circuit court reversibly erred when it struck Silk's supplemental memorandum that contained new evidence of Silk's good behavior in prison because the supplemental memorandum would have helped show that Silk was a Level II rather than Level III offender.

3. The circuit court erred by calculating his time served from the date of the revocation of his probation rather than the date of his arrest.

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 conclude that Silk's contentions are without merit. The circuit court did not err in holding that the HPA did not abuse its discretion in classifying Silk as a Level III offender, Silk's supplemental memorandum notwithstanding. Williamson v. Hawai'i Paroling Authority, 97 Hawai'i 183, 35 P.3d 210 (2001). The circuit court did not err in calculating Silk's time served from the date of probation revocation. State v. March, 94 Hawai'i 250, 11 P.3d 1094 (2000).

Therefore,

The "Findings of Fact, Conclusions of Law, and Order Denying Grounds Three and Seven and Granting in Part and Denying in Part Ground One of Petitioner Vernon Silk's Petition for Post-

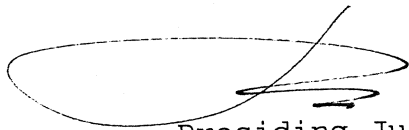
Conviction Relief" filed on November 1, 2004 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, January 5, 2007.

On the briefs:

Stuart N. Fujioka
for Petitioner-Appellant.

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



Presiding Judge



Associate Judge



Associate Judge