NO. 27836

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

DAVID N. MARTIN, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP No. 06-1-0004; Cr. No. 00-1-0009)

MEMORANDUM OPINION
(By: Watanabe, Presiding J., Lim, and Nakamura, JJ.)

Petitioner-Appellant David N. Martin (Martin), proceeding pro se, appeals the order entered by the Circuit Court of the First Circuit (the circuit court)[1] on March 17, 2006, denying without a hearing Martin's Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief (HRPP Rule 40 Petition) entered on January 24, 2006. We affirm.

BACKGROUND

A. Criminal No. 00-01-0009

On April 4, 2000, in Criminal No. 00-01-0009, Martin pleaded "no contest" before the Honorable Sandra A. Simms (Judge Simms) to the charge that he committed Unauthorized Entry into Motor Vehicle, in violation of Hawaii Revised Statutes (HRS) § 708-836.5.[2] Martin was represented at the change-of-plea

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

[2] Hawaii Revised Statutes § 708-836.5 (Supp. 2000) stated:

Unauthorized entry into motor vehicle. (1) A person (continued...)

hearing by Deputy Public Defender Clayton Kimoto (Kimoto). At the hearing, Martin signed a Guilty Plea No Contest form, thereby indicating his agreement with the following statements:

> 5. . . . .
>
> ☒ I plead no contest because, after discussing all the evidence and receiving advice on the law from my lawyer, I believe that it is better to put myself at the mercy of the court.
>
> . . . .
>
> 8. I am pleading of my own free will. No one is putting any kind of pressure on me or threatening me or anyone close to me to force me to plead. I am not taking the rap or pleading to protect someone else from prosecution.
>
> 9. I have not been promised any kind of deal or favor or leniency by anyone for my plea, except that I have been told that the government has agreed as follows: (If None, Write None)
>
> NONE
>
> I know that the court is not a party to, so that it does not have to recognize, any deal or agreement between the prosecutor and my lawyer or me. I know that the court has not promised me leniency.

After accepting Martin's no-contest plea, Judge Simms set the sentencing hearing for June 13, 2000.

At the June 13, 2000 hearing, Judge Simms sentenced Martin to incarceration for five years with credit for time served. The written judgment convicting and sentencing Martin was entered the same day.

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[2](...continued)
commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights.

(2) Unauthorized entry into motor vehicle is a class C felony.

On July 7, 2000, Martin filed a Motion for Withdrawal of No Contest Plea and/or Reconsideration of Sentence (Motion for Withdrawal/Reconsideration) pursuant to HRPP Rule 35. In a declaration of counsel attached to the motion, Kimoto stated, in relevant part:

> 2. On April 4, 2000, [Martin] entered a no contest plea before this Court. On June 22, 2000, [Martin] requested I file a motion to withdraw his no contest plea.
>
> 3. [Martin] appeared before this Court on June 13, 2000 for sentencing in the above-entitled case. At that time, this Court imposed the following sentence: a five (5) year term of incarceration.
>
> 4. [Martin] respectfully requests this Court to consider probation in the event that the Court denies his motion to withdraw his no contest plea.

In a memorandum in opposition to that part of the Motion for Withdrawal/Reconsideration in which Martin sought to withdraw his no-contest plea, Respondent-Appellee State of Hawai'i (the State) argued, in relevant part, as follows:

> In this case, the on-the-record colloquy[3] on April 4, 2000 between the Circuit Court and [Martin], shows that the Court determined that [Martin] made his plea voluntarily and that [Martin] had a full understanding of what his "no contest" plea connoted and its direct consequences. The record supports the fact that [Martin] entered his plea voluntarily, had a full understanding of what his plea connoted and the consequences of his plea. (See Exhibit "3" - Minutes of change of plea hearing.)

As evidence of the "on-the-record" colloquy conducted by the circuit court on April 4, 2000, the State attached as Exhibit 3: (1) the circuit court clerk's minutes of an

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[3] Respondent-Appellee State of Hawai'i did not attach the transcripts of the April 4, 2000 hearing to its memorandum in opposition to the Motion for Withdrawal of No Contest Plea and/or Reconsideration of Sentence (Motion for Withdrawal/Reconsideration) filed by Petitioner-Appellant David N. Martin (Martin) on July 7, 2000.

in-chambers conference that took place at 1:30 p.m. on April 4, 2000 with Judge Simms, the deputy prosecutor, and Kimoto present; and (2) the circuit court clerk's minutes of the change-of-plea hearing that followed the in-chambers conference. The minutes of the in-chambers conference state:

> DISCUSSION ON DISPOSITION OF CASE. DEFT HAS BAD MISDEMEANOR RECORD, HAD SOME FELONIES BUT REDUCED TO MISDEMEANORS. DEFT WANTED STATE TO REDUCE CHARGE BUT DECLINED AND DEFT WAS REJECTED FOR DRUG COURT. PROBATION OKAY IF HE COPS BUT STAYS IN SO NO FURTHER TROUBLE. COUNSEL TO TALK TO DEFT.

(Emphasis added.)

The minutes of the change-of-plea hearing state as follows:

> 2:25 CASE CALLED. THE COURT NOTED THIS WAS NOW FOR CHANGE OF PLEA TO NO CONTEST. HAVING RECD COP FORM THE COURT PROCEEDED TO QUESTION DEFT.
> 2:30 THE COURT WAS SATISFIED DEFT MADE KNOWING & VOLUNTARY CHANGE OF PLEA.
> 2:30 DEFT SIGNED ACKNOWLEDGMENT ON COP FORM.
> 2:31 [DEPUTY PROSECUTOR] RECITED FACTUAL BASIS.
> 2:31 THE COURT WAS SATISFIED THERE WAS FACTUAL BASIS FOR THE CHARGE.
> 2:32 DEFT PLED NO CONTEST AS CHARGED.
> 2:32 THE COURT ACCEPTED THE NO CONTEST PLEA & SET SENTENCING FOR TUESDAY, 6/13/00 AT 8:30 AM.

In support of its memorandum opposing that part of Martin's Motion for Withdrawal/Reconsideration that sought reconsideration of Martin's sentence, the State also attached the circuit court clerk's minutes of the June 13, 2000 sentencing hearing and commented that

> [Martin] was sentenced on June 13, 2000 and after Judge Simms reviewed [Martin's] previous convictions and hearing [Martin's] answers to the Court's questions, found that there was no period of time when [Martin] was not involved in criminal activity. The Court further stated that as much as she'd like to figure out a way to impose probation,

> [Martin] was back in custody six (6) months after being released from prison and was unsuccessful in drug treatment. The court also stated that if [Martin] were placed on probation, that [Martin] would likely be revoked and resentenced to a five (5) year term. [Martin] was therefore, sentenced to five (5) year [sic] incarceration.

The State argued that based on the minutes, which reflected that the circuit court "particularly stated why probation was not warranted in this case[,]" reconsideration of Martin's sentence to incarceration was not warranted.

It appears from the record in Criminal No. 00-01-0009 that the circuit court orally denied Martin's Motion for Withdrawal/Reconsideration. However, no written order denying Martin's motion was ever entered.

B. Martin's HRPP Rule 40 Petition

On January 24, 2006, almost six years after he had been sentenced, Martin filed the HRPP Rule 40 Petition that underlies this appeal. In the petition, Martin contended that he was denied the effective assistance of counsel because: (1) Kimoto lied to Martin by saying that if Martin changed his plea from not guilty to no contest, Judge Simms would release Martin with time served and a sentence of five years' probation; (2) at the hearing, Judge Simms denied offering a deal to Kimoto on Martin's behalf and Martin was sentenced to five years' imprisonment with a reconsideration option where, if Martin found employment and his employer showed up in court on Martin's behalf, Martin would be released on probation; (3) Martin found employment and asked

his employer to call Kimoto, who "knowingly and intentionally told [Martin's] employer" that it was not necessary for her to show up in court but instead, she could submit a letter of intent to hire Martin; (4) as a result of "Kimoto's lies, misrepresentations and negligences[,]" Martin's Motion for Withdrawal/Reconsideration was denied; (5) despite statements by Kimoto that he would file an HRPP Rule 40 petition on grounds that Judge Simms stated she would release Martin if Martin changed his plea to no contest, Kimoto did not file an HRPP Rule 40 petition; and (6) Kimoto failed to file an appeal "[i]n regards to all that happened to [Martin]."

On March 17, 2006, the circuit court[4] entered an order that denied without a hearing Martin's HRPP Rule 40 Petition on grounds that the petition was "patently frivolous and [was] without a trace of support either in the record or from other evidence submitted by [Martin] and therefore, has failed to state a claim upon which relief may be granted." This appeal followed.

DISCUSSION

Martin raises three points on appeal: (1) his counsel provided ineffective assistance, (2) the judgment and sentence against him violated the constitutions of both the United States and the State of Hawai'i, and (3) he has been made to suffer

[4] Judge Del Rosario presided.

cruel and unusual punishment as a result of his incarceration from 1999 to 2005.

Martin's opening brief failed to set forth any argument as to his second point. Accordingly, this point or error is deemed waived. HRAP Rule 28(b)(7).

Martin's third point was never raised in his HRPP Rule 40 Petition and therefore, was never considered by the circuit court. Pursuant to HRPP Rule 40(a)(3),[5] this point is also deemed waived. Stanley v. State, 76 Hawai'i 446, 451, 879 P.2d 551, 556 (1994).

Martin's ineffective-assistance-of-counsel claim has three components: (1) Martin claims that although he had a strong case, he pleaded no contest, based on Kimoto's "lying" to Martin saying that if Martin changed his plea, Martin would receive a probation sentence from Judge Simms; (2) Kimoto failed

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[5] Hawai'i Rules of Penal Procedure Rule 40(a)(3) provides as follows:

> **Rule 40. POST-CONVICTION PROCEEDING.**
>
> **(a) Proceedings and grounds. . . .**
>
> (3) INAPPLICABILITY. Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. Except for a claim of illegal sentence, an issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

to call Martin's prospective employer to testify at the hearing on Martin's Motion to Withdrawal/Reconsideration; and (3) Kimoto failed to file an appeal or an HRPP Rule 40 petition on Martin's behalf.

The Hawai'i Supreme Court has held that "[t]he question on appeal of a denial of a Rule 40 petition without a hearing is whether the trial record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court." Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999). Based on our review of the record before the circuit court, we conclude that Martin's HRPP Rule 40 Petition failed to show a colorable claim that Martin received ineffective assistance of counsel.

As to Martin's claim that Kimoto lied to him about the sentence Martin would receive for changing his plea, the court clerk's minutes of the April 4, 2000 in-chambers conference show that Kimoto had a basis for predicting that Martin would get probation if Martin changed his plea. The failure of any prediction by Kimoto that Martin would receive probation to come true did not establish that Kimoto "lied" to Martin or that Kimoto provided ineffective assistance. The record shows that Martin signed a change-of-plea form in which he acknowledged that he was not promised any kind of deal by anyone for his plea and that the court had not promised him leniency. Martin also

acknowledged understanding the court's admonishment at the change-of-plea hearing that if the court gave Martin a sentence that was different from what his counsel or the prosecutor had discussed with Martin as being appropriate, Martin would not be entitled to withdraw his plea. Martin thus understood that he could be sentenced to imprisonment rather than probation. Therefore, Martin failed to demonstrate a colorable claim that Kimoto was ineffective for "lying" to Martin.

As to Martin's claim that Kimoto was ineffective for failing to call Martin's prospective employer to testify at the hearing on Martin's Motion for Withdrawal/Reconsideration, the record in Criminal No. 00-01-0009 includes a letter dated September 13, 2000 to Kimoto from Nani Kinimaka-Davis, co-owner of NaniBaba's 4k's Katerings, "gladly offer[ing] [Martin] employment at this time[.]"[6] Thus, while Martin's prospective employer was not physically present in court, the circuit court was made aware that Martin had a job offer if he were sentenced to probation. For claims of ineffective assistance of trial counsel, "the burden is upon the defendant to demonstrate that, in light of all the circumstances, counsel's performance was not objectively reasonable--*i.e.*, within the range of competence

[6] The letter apparently was provided to the Circuit Court of the First Circuit (the circuit court) and is included in the back of the case file for Criminal No. 00-01-0009. If the letter was offered as evidence in support of Martin's July 7, 2000 Motion for Withdrawal/Reconsideration, the letter should have been filed in the record of the case. On remand of this case, the circuit court is instructed to include the letter in the record of the case.

demanded of attorneys in criminal cases." Briones v. State, 74 Haw. 442, 462, 848 P.2d 966, 976 (1993) (quotation marks omitted). Moreover, "[g]eneral claims of ineffectiveness are insufficient and every action or omission is not subject to inquiry." Id. Here, Martin failed to explain how the prospective employer's physical presence in court would have caused a different sentencing result. He therefore failed to meet his burden of demonstrating that Kimoto's failure to call the prospective employer to testify was not objectively reasonable.

As to Martin's claim that Kimoto was ineffective for failing to file an appeal, we note that "[g]enerally, a valid and unconditional plea of guilty or no contest constitutes a waiver of the right to appeal all nonjurisdictional claims." State v. Riveira, 92 Hawai'i 546, 550, 993 P.2d 580, 584 (App. 1999) (rev'd on other grounds). According to the Hawai'i Supreme Court, the policy behind this rule, as articulated by the United States Supreme Court in Lefkowitz v. Newsome, 420 U.S. 283, 289 (1975), is as follows:

> Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained.

State v. Morin, 71 Haw. 159, 163, 785 P.2d 1316, 1319 (1990) (quotation marks omitted).

However, a guilty or no-contest plea does not preclude a defendant from appealing an illegal sentence, Riveira, 92 Hawai'i at 550, 993 P.2d at 584, since "[a]n appeal pertaining to the legality of a sentence does not disturb finality in the conviction, no matter how the appeal is ultimately decided." Id. Moreover, since "[i]t is a constitutional requirement that a trial judge ensure that a guilty plea be voluntarily and knowingly entered[,]" State v. Dicks, 57 Haw. 46, 49, 549 P.2d 727, 730 (1976),

> it is unreasonable to foreclose the right to appeal a sentence, for a defendant pleading guilty or no contest cannot possibly know then what will occur later, at the sentencing stage. *See United States v. Melancon,* 972 F.2d 566, 571 (5th Cir. 1992) (Parker, Jr., concurring) (a defendant can never "knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a 'waiver' is inherently uninformed and unintelligent."); *United States v. Raynor,* 989 F. Supp. 43, 49 (D.C. 1997) ("A defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant has no knowledge as to what will occur at the time of sentencing.")

Riveira, 92 Hawai'i at 551, 993 P.2d at 585.

In this case, Martin pleaded no contest to the charge of Unauthorized Entry into Motor Vehicle. Therefore, Martin was precluded from directly appealing his judgment of conviction on nonjurisdictional grounds. Kimoto's failure to file a direct appeal from the judgment of conviction in Criminal No. 00-01-0009 was therefore, not ineffective.

Additionally, the record reflects that on July 7, 2000, three weeks after Judge Simms sentenced Martin to five years' incarceration rather than the expected probation term, Kimoto filed the Motion for Withdrawal/Reconsideration on Martin's behalf, pursuant to HRPP Rule 35. Since a written order has not yet been entered as to that motion, the time for filing an appeal from that order has not begun to run, and Kimoto cannot be held ineffective for failing to file an appeal from a yet-to-be-entered order.

CONCLUSION

In light of the foregoing discussion, we conclude that the circuit court did not err in denying Martin's HRPP Rule 40 Petition without a hearing. Accordingly, we affirm the Order Denying Petition for Post-Conviction Relief entered by the circuit court on March 17, 2006. Our affirmance is without prejudice to Martin's right to file an appeal from any appealable order that the circuit court may subsequently file in deciding Martin's Motion for Withdrawal/Reconsideration.

DATED: Honolulu, Hawai'i, February 15, 2007.

On the briefs:

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