

NO. 27773

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

FRANCIS M. NAKAMURA, JR., Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP No. 05-1-0036; FC-Cr. No. 93-0001)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Francis M. Nakamura, Jr. (Nakamura or Petitioner) appeals the decision and order entered by the Circuit Court of the First Circuit (the circuit court)¹ on February 2, 2006, denying without a hearing his May 3, 2005 Hawai'i Rules of Penal Procedure (HRPP) Rule 40 Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody. We affirm.

On November 29, 1993, the Family Court of the First Circuit (the family court)² entered a judgment convicting Nakamura of six counts of sexual assault in the first degree, in violation of Hawaii Revised Statutes (HRS) § 707-730(1)(b) (1990), and one count of sexual assault in the third degree, in violation of HRS § 707-732 (1990), and sentencing him to life imprisonment with the possibility of parole for each of the six counts of first degree sexual assault and five years'

¹ The Honorable Richard K. Perkins presided.

² The Honorable Linda K. Luke (Judge Luke) presided.

imprisonment for the single count of third degree sexual assault, all terms to run consecutively. In his HRPP Rule 40 petition that underlies this appeal, Nakamura alleges that (1) his rights to due process and trial by jury were violated when the family court "usurped the jury's verdict in extending [his] sentence[,]" and (2) "[t]he extended term of imprisonment is illegal under the Protection of Winship and *William v. New York*, under the 5th, 6th, and 14th Amd."

Our review of the record on appeal indicates that Nakamura raised these same issues in the following post-conviction proceedings:

(1) In appeal No. 17603, Nakamura filed on December 1, 1993 a direct appeal from the family court's November 29, 1993 judgment, which the Hawai'i Supreme Court affirmed by Summary Disposition Order on January 13, 1997;

(2) In appeal No. 21500, Nakamura filed on April 17, 1998 an appeal from the family court's³ April 13, 1998 order denying his May 6, 1997 Motion for Reduction of Sentence, or in the Alternative, for Reconsideration of Sentence, which the supreme court affirmed by Summary Disposition Order on May 13, 1999;

(3) In appeal No. 25798, Nakamura filed on April 28, 2003 an appeal from the circuit court's March 13, 2003 order

³ Judge Luke presided.

denying his August 13, 2001 Motion for Correction of Illegal Sentence pursuant to HRPP Rule 35, which the supreme court dismissed for lack of appellate jurisdiction on October 24, 2003; and

(4) In appeal No. 26782, Nakamura filed on August 30, 2004 an appeal from the circuit court's July 27, 2004 order denying his first HRPP Rule 40 petition for post-conviction relief without a hearing, which the supreme court dismissed for lack of appellate jurisdiction on October 13, 2005.

Pursuant to HRPP Rule 40(a)(3), "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."

In light of the record on appeal and after duly considering and analyzing the law relevant to the arguments and issues raised by the parties, we conclude that the circuit court did not err in denying Nakamura's HRPP Rule 40 petition without a hearing.

Affirmed.

DATED: Honolulu, Hawai'i, March 20, 2007.

On the briefs:

Francis M. Nakamura, Jr.,
petitioner-appellant, pro se.

James M. Anderson,
deputy prosecuting attorney,
City and County of Honolulu,
for respondent-appellee.

James A. Burns
Brunine Ka Watareke
Craig W. Nakamura