

NO. 26985

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

MARK D. CAIRES, Petitioner-Appellant, v.  
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(S.P.P. NO. 04-1-0003K (Cr. No. 02-1-0157K))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Mark D. Caires (Caires) appeals from the Findings of Fact; Conclusions of Law; and Order Denying Petition for Post-Conviction Relief filed on November 10, 2004 in the Circuit Court of the Third Circuit<sup>1/</sup> (circuit court). Caires filed his Petition for Post-Conviction Relief (Rule 40 Petition) on February 25, 2004 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40.

In the underlying criminal case, the State charged Caires with two counts of first degree sexual assault, one count of promoting pornography for minors, two counts of promoting a dangerous drug in the third degree, two counts of drug paraphernalia, one count of promoting a detrimental drug in the second degree, and one count of promoting a detrimental drug in the third degree.

Caires first appeared in court on September 23, 2002 and represented to the court that he could not get a public

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<sup>1/</sup> The Honorable Ronald Ibarra presided.

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defender because he owned his own house and that he was refinancing his house to retain an attorney. The circuit court continued the case until October to give him time to retain an attorney. Caires appeared in court on October 14, 2002 without an attorney, represented to the court that he was still trying to refinance his house, and entered a plea of not guilty. The circuit court set trial for January 2003.

In November 2002, Caires applied to the Office of the Public Defender for counsel, and on November 20, 2002, the circuit court appointed that office to represent him. On December 2, 2002, Deputy Public Defender Peter Bresciani (Bresciani) moved to continue Caires' trial; the circuit court granted the motion and continued the trial to March 11, 2003. Prior to trial, Bresciani filed the following documents on behalf of Caires: Disclosure of Defenses, opposition memorandum to State's Motion to Determine Voluntariness of Defendant's Statements, supplemental request for disclosure, motion to sever Counts I, II, and III, and a Motion to Suppress Evidence and Statements on January 10, 2003 (Motion to Suppress).

On January 27, 2003, Caires appeared before the circuit court to enter a plea of no contest to one count each of Sexual Assault in the Third Degree, Promoting Pornography for Minors, and Promoting a Dangerous Drug in the Third Degree. The circuit court conducted the plea colloquy, in which Caires stated in part: Bresciani had explained the charges to him and he understood the charges (including the lesser charge of Sex

Assault in the Third Degree); Bresciani had explained his possible defenses; he understood that the State was recommending concurrent sentences of five years for each count, he faced a mandatory minimum of twenty months, and the parole board might set a longer mandatory minimum; he had reviewed the no contest plea with Bresciani, understood the plea agreement, and had no questions; no one was pressuring or threatening him to plead; he had no complaints about Bresciani and was satisfied with what Bresciani had done for him; he understood that, by entering his plea, his Motion to Suppress would not be heard; and he understood that he would not be permitted to withdraw his no contest plea. The circuit court sentenced Caires to concurrent terms of imprisonment of five years on each count, with a mandatory minimum term of twenty months of imprisonment. The circuit court entered the Judgment on March 11, 2003. Caires did not appeal from the Judgment.

In his Rule 40 Petition, Caires alleged:

(1) He received ineffective assistance of counsel because Bresciani (a) failed to move for suppression of the drugs and drug paraphernalia evidence where the warrant used to seize the evidence failed to state that the search was for drugs and drug paraphernalia; (b) refused to proceed to trial and informed Caires that he had no choice but to enter into a plea agreement; (c) mislead Caires about the length of his sentences if he did not plead; (d) mislead Caires as to his possible defenses to the charges and failed to inform Caires of mitigating factors based

upon the evidence; (e) failed to challenge the grand jury indictment on the ground that there was insufficient admissible evidence to establish all the elements of each offense; and (f) failed to exercise due diligence and sound judgment, which acts and/or omissions deprived Caires of potentially meritorious defenses.

(2) The circuit court unreasonably denied him his constitutional right to obtain private counsel and appointed the Office of the Public Defender to represent him.

(3) The actions and/or omissions of Bresciani deprived Caires of information necessary to make an intentional, knowing, voluntary, and intelligent waiver of his right to trial and coerced him into entering no contest pleas because Bresciani stated that he could not and would not proceed to trial.

(4) The actions and/or omissions of the circuit court deprived him of an intentional, knowing, voluntary, and intelligent waiver of his right to trial and coerced him into entering no contest pleas because he was unreasonably denied a continuance to retain private counsel.

On March 19, 2004, the circuit court appointed Paul Dolan (Dolan) to represent Caires on his Rule 40 Petition. The State filed its Opposition to Rule 40 Petition on March 22, 2004.

The circuit court held hearings in October 2004 on the Rule 40 Petition. Bresciani, Caires, Detective Donna Springer, and two other witnesses testified. Solely for the purpose of

that hearing, Caires waived the attorney/client privilege between himself and Bresciani.

Bresciani testified as follows:

(1) It was the normal practice of the Office of the Public Defender to request a copy of the grand jury transcript, and it was an oversight on his part that he did not order the transcript. He did not obtain the transcript or file a motion to quash the indictment because, after reviewing the police reports provided to him by the State, he determined there was probable cause for all of the offenses charged and did not see an issue with the indictment. He could not think of a dispositive grand jury motion; every grand jury motion he could think of would only knock out the indictment, thereby allowing the grand jury to re-indict. Caires never pointed out to him anything to support an argument that there was insufficient admissible evidence introduced at the grand jury.

(2) Although the Office of the Public Defender had an investigator, the investigator was not assigned to this case and he had done all of the investigating himself. He had read all the reports and discovery in Caires' case, had viewed one videotape that had a scene on it similar to the one the minor had described, and had spoken to one witness. After reading the discovery, he had a list of 47 items of things to do, questions to ask, people to interview, and other discovery items to obtain prior to trial. He did not finish his list of things to do or interview other witnesses because the case ended before he got to

that stage. He testified that he has tried, but has never been able, to interview a complaining witness in a child sexual assault case. He would not have told Caires that he would challenge statements of witnesses who Caires claimed were telling falsehoods; however, he had noted that one witness's statement had significant inconsistencies.

(3) In the Motion to Suppress, he raised the issues of whether there was a knock before the search of Caires' residence and whether certain items were seized within the scope of the search warrant. His notes revealed that on December 11, 2002, he discussed the motion and the facts regarding the search with Caires in preparation for filing the motion. The motion was scheduled to be heard on January 27, 2003.

(4) Because of Caires' statement to the police on the drug charges, his statements to Bresciani, and the facts of the case, Caires had a high chance of being convicted on the drug charges. He told Caires that Caires had a high chance of being convicted and that if Caires were convicted on the drug charges, Caires would receive a mandatory minimum term of imprisonment of 20 months. When asked if he told Caires that the only jail time Caires would do would be the mandatory minimum, he stated that he probably told Caires that Caires would do a substantial portion of the five years.

(5) He advised Caires that if Caires went to trial on the class A sex assault charges and lost, Caires would receive a

maximum sentence of 20 years' imprisonment, with a mandatory minimum of 6 years, 8 months.

(6) He recommended to Caires that if Caires was innocent, he should go to trial, but if he was not innocent, it was a good idea to plead and avoid the exposure of 20 years of imprisonment. He told Caires that for the same five years Caires could take care of this whole thing and it was Caires' choice. He read from his notes that he told Caires several times "it was his choice, not mine." He did not recall if, at some point during their talks about a plea agreement, Caires said maybe he should go to trial. Caires did not acknowledge his guilt on the sex assault charges, but stated that he wanted to take the deal. He never told Caires that Caires had to enter into a plea agreement. He does not allow his clients to plead if he feels they do not understand the possible consequences of the plea. He did not know if he ever advised Caires that if Caires went to trial he could be convicted of an included offense. Well before the change of plea, he had discussed with Caires the difference between a class A and class C sex assault offense. He did not think he discussed concurrent sentences with Caires.

(7) At the January 27, 2003 hearing, the change of plea was held instead of the Motion to Suppress. At no time on that day did Caires advise him that Caires wanted to go to trial. At that time, Caires did not indicate he was confused or too worried to make a rational decision, and Caires chose to sign the plea form. He went over the change of plea form with Caires; the

form stated that, by pleading, Caires gave up the right to file and pursue any pretrial motions. He explained to Caires for each of the offenses: the elements that had to be proved, a summary of the evidence, and possible defenses.

(8) He never told Caires that he would not under any circumstances proceed to trial.

(9) He had notes that on the day of Caires' sentencing, Caires had called and talked to another attorney and wanted to withdraw his plea.

Donna Springer (Springer) testified that she had been a detective with the Hawai'i County Police Department and had assisted Detective Jenkins (Jenkins) in the execution of the search warrant on Caires' residence. The police were authorized to search for sexually explicit videotapes and for articles of identification and to photograph and diagram the residence, and that to search the residence, it was necessary for the police to open drawers and containers that could hold those items. Springer testified that the police department had a standard policy of knock and announce when officers entered a residence to search. It was Jenkins' responsibility to do the knock, but Springer did not know if Jenkins had knocked on the door. Although Jenkins was unavailable to testify as he was living on the mainland, Springer testified that Jenkins was an experienced detective who had executed other search warrants prior to this one and she had no reason to believe he had departed from the standard knock and announce procedure of the department in this



case. Springer also testified that from a dresser drawer in the bedroom of the residence the police recovered vials, a clear packet containing a crystal-like substance, a pink packet, an envelope addressed to Caires, a check box with a gold Mastercard in Caires' name and a clear packet containing a white rock-like substance, and a black vinyl zippered bag with some pink little baggie-type containers (used for a small rock-like portion of crystal methamphetamine).

Springer testified she was present when Caires was interviewed and Caires adamantly denied having had sexual contact with the minor; did not admit that he had showed the minor pornographic videotapes, but admitted that he had left the videotape in the VCR and the minor saw the tape; admitted he was on the property when the minor saw the tape; admitted that he had smoked "ice" in April; stated that he was trying to "clean up the house" by getting rid of any drugs or drug paraphernalia; and admitted that the drugs and ice pipes found in his residence could have been his.

Caires testified that he had appeared in circuit court on September 23, 2002 and represented to the court that he was hiring an attorney. The circuit court gave Caires additional time to hire an attorney; however, Caires returned to court on November 14, 2002 without an attorney. Since Caires was not represented by counsel, the State provided directly to Caires 565 pages of discovery that he paid for and picked up on November 1, 2002. Caires stated that he did not read the discovery while it

was in his possession or after he gave it to Bresciani, but Bresciani told him what was in it. He testified that he entered a plea because he did not have enough time to get his own counsel as the refinancing of his house was not going to go through in time and he felt overwhelmed.

On November 10, 2004, the circuit court denied the Rule 40 Petition. Caires timely appealed.

On June 24, 2005 Dolan filed a motion to withdraw as counsel, which the circuit court granted on July 11, 2005. On September 9, 2005, the circuit court appointed new counsel to Caires for this appeal.

On appeal,<sup>2/</sup> Caires contends:

(1) The circuit court erred and/or abused its discretion by determining that Caires received effective assistance of counsel even though Bresciani (a) failed to request and review a transcript of the grand jury proceedings, (b) failed to thoroughly investigate the case by interviewing any of Caires' or the State's witnesses, including the complainant, alleged victim, and law enforcement personnel; (c) failed to review or discuss the discovery with him; (d) misrepresented the length of sentences Caires would receive if he proceeded to trial and were

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<sup>2/</sup> The Opening Brief of Defendant-Appellant Mark D. Caires (Caires) fails to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) in that each point of error does not state "(ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency." Caires' appellant counsel stated in an affidavit filed February 17, 2006 that the opening brief was prepared by Caires and not by counsel. Counsel signed the brief only on behalf of Caires and not as the work product of counsel. Caires is warned that future non-compliance with HRAP 28 may result in sanctions against him.

found guilty instead of taking the plea agreement; (e) gave Caires conflicting outcomes if the Motion to Suppress hearing proceeded; (f) failed to discuss with Caires the possibility of his being convicted of included offenses if he went to trial; (g) failed to advise Caires of the possibility of concurrent sentences if he were convicted; (h) failed to tell Caires that he "would challenge statements of witnesses which [Caires] claimed were telling falsehoods"; (i) refused to proceed to trial and told Caires that he had to take the plea agreement; (j) should have proceeded with the Motion to Suppress prior to Caires entering his plea; and (k) failed to inform Caires of potentially meritorious defenses.

(2) The circuit court erred and/or abused its discretion in determining Caires' claim of involuntariness of plea by applying the wrong standard of a motion to withdraw plea under HRPP Rule 32, instead of the correct standard under Eli v. State, 63 Haw. 474, 477, 630 P.2d 113, 116 (1981) (the court was required to look at the entire record to determine whether Caires' claims or recantations were credible and believable).

(3) The circuit court erred in its Findings of Fact Nos. 11, 12, 13, and 14.

(4) The circuit court erred in its Conclusions of Law Nos. 1, 2, 3, and 4.

(5) The circuit court abused its discretion and plainly erred when the judge, who had accepted Caires' plea, failed sua sponte to recuse himself from ruling on the Rule 40

Petition even though one of the claims in the petition was that the court had abused its discretion in refusing to continue the case to allow Caires to retain private counsel.

(6) Caires was deprived of his right to effective assistance of counsel on his Rule 40 Petition when Dolan failed to argue at the hearing on the petition that (a) Caires' trial should have been continued so he could obtain private counsel and (b) the judge should have recused himself from hearing the petition.

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 hold that the circuit court properly denied Caires' Rule 40 Petition.

Therefore,

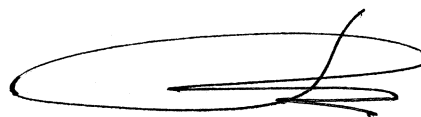
The Findings of Fact; Conclusions of Law; and Order Denying Petition for Post-Conviction Relief filed on November 10, 2004 in the Circuit Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 19, 2007.

On the briefs:

E.F. Gianotti  
for Petitioner-Appellant.

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



Presiding Judge



Associate Judge



Associate Judge