

NO. 27081

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

MARYANN ACKER, Petitioner/Appellee/Cross-Appellant,
v.
STATE OF HAWAI'I, Respondent/Appellant/Cross-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 00-1-0031 (Cr. No. 56042))

SUMMARY DISPOSITION ORDER

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

Respondent/Appellant/Cross-Appellee State of Hawai'i (the State) appeals from the "Amended Findings of Fact and Conclusions of Law and Order Re Petitioner's Amended Petition to Vacate, Set Aside, or Correct Judgment; Order" (Amended FOF/COL & Order) entered on March 7, 2005 in the Circuit Court of the First Circuit^{1/} (circuit court). Petitioner/Appellee/Cross-Appellant Maryann Acker (Acker) cross-appeals from the Amended FOF/COL & Order.

On August 15, 2000, Acker filed her "Petition to Vacate, Set Aside or Correct Judgment or to Release Petitioner from Custody," pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40, and a separate supporting memorandum. On May 13, 2002, Acker filed her "Amended Petition to Vacate, Set Aside or Correct Judgment or to Release Petitioner from Custody Pursuant to Rule 40 Haw. Rules of Penal Proc." The two petitions are collectively referred to as the "Rule 40 Petition."

On March 31, 1982, in the underlying criminal case (Cr. No. 56042), a jury found Acker guilty of two counts each of Kidnapping, Robbery in the First Degree, and Unauthorized Control of Propelled Vehicle and one count each of Murder and Burglary in

^{1/} The Honorable Michael A. Town presided.

EM. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2007 SEP 27 AM 7:52

FILED

the First Degree. The circuit court sentenced Acker to concurrent terms of imprisonment as follows: (1) life with the possibility of parole and a mandatory minimum sentence of ten years on the Murder charge; (2) ten years for one of the Kidnapping charges and twenty years for the other Kidnapping charge; (3) twenty years for each of the two robbery charges; (4) five years for the Unauthorized Control of Propelled Vehicle charge, and (5) ten years for the burglary charge.

Acker appealed her convictions, alleging that the circuit court had erred by (1) denying her motions to dismiss for pre-indictment delay and lack of probable cause, (2) permitting evidence of her alleged prior crimes, (3) giving a jury instruction on accomplice, and (4) denying her invocation of the spousal privilege. In No. 8745, the Hawai'i Supreme Court affirmed her convictions.

In her Rule 40 Petition, Acker alleged:

1. Her conviction for Murder should be dismissed or a new trial held on this charge because her husband, William Acker (William), admitted during his May 2, 1991 parole hearing in California that he was solely responsible for the murder in Hawai'i.

2. Her right to a fair and impartial trial had been violated by the suppression of Brady^{2/} material favorable to her, namely, that William had pleaded nolo contendere to first degree murder with the use of a gun in California and been sentenced to life with the possibility of parole for that offense.

3. The State failed to disclose information about William's jailhouse activities as an informant.

4. The deputy prosecuting attorney committed prosecutorial misconduct by not informing Acker or the circuit court that William was serving a sentence of life with parole.

^{2/} Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

The circuit court entered its Decision on January 21, 2005. The circuit court then entered its Amended FOF/COL & Order, in which the court granted the Rule 40 Petition as to the State's failure to disclose evidence about William's prior conviction and sentence, but not as to the State's alleged failure to disclose evidence about William's jailhouse informant activities. The court declined to address Acker's prosecutorial misconduct claim. The circuit court vacated Acker's convictions and sentences in Cr. No. 56042 and ordered that Acker receive a new trial.

The State timely appealed, and Acker cross-appealed. On appeal, the State contends (1) the circuit court's Findings of Fact (FOFs) 1, 3, 10, 11, 12, 13, 14, 16, 17, and 18 were clearly erroneous; (2) the circuit court's Conclusions of Law (COLs) that Brady violations occurred were wrong (COLs 27, 28, 30, 33, 34, 38, 39, 40, 41, 42, 43, 44, and 45); and (3) the circuit court concluded wrongly that the waiver provision of HRPP Rule 40 did not apply (COL 47).

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 the circuit court was correct to the extent it ordered that Acker's Rule 40 Petition be granted and her Murder conviction (Count 6) in Cr. No. 56042 be set aside for a new trial.

William pleaded nolo contendere in California to the first degree murder of Cesario Arauza (Arauza) and to using a gun in the commission of that offense, and he was sentenced to life imprisonment with the possibility of parole. Nevertheless, William testified at Acker's trial in Hawai'i that Acker had been the shooter in the Arauza murder. William further explained that he pled to the Arauza murder only because under the felony murder rule, he felt "responsible" for Arauza's murder even though he

had not been present when Acker shot Arauza. William's testimony that Acker had been the shooter in the Arauza murder was used to bolster his testimony that Acker had also been the shooter in the murder of Lawrence Hasker (Hasker) in Hawai'i.

The State did not disclose to Acker that William had pleaded nolo contendere to both murdering Arauza and using a gun in the commission of that murder. Thus, contrary to the impression left by William's testimony, his first degree murder conviction in California had not been based on a felony murder theory, but on the allegation that he had been the person pulling the trigger. The State also failed to disclose to Acker that William had been sentenced in California to life with the possibility of parole and, instead, disclosed an FBI "rap sheet" that erroneously reported William's sentence as life without parole.

We conclude that the State's failure to disclose the true facts concerning William's nolo contendere plea, conviction, and sentence in California denied Acker her right to a fair trial on her Murder charge. Had the State disclosed this information to Acker, there is a reasonable probability that the verdict on her Murder charge would have been different. See State v. Moriwaki, 71 Haw. 347, 356, 791 P.2d 392, 397 (1990).

Evidence that William had pleaded nolo contendere to being the shooter and murdering Arauza would have served to undermine and impeach his claim that Acker had shot Arauza. It would also have served to contradict his explanation for pleading to murder in California and to cast his role in the murders of Arauza and Hasker in a different light to the jury. Competent defense counsel could also have used the fact that William had been sentenced to life with the possibility of parole to attack William's interest in and motives for cooperating with the government and placing the blame on Acker. On the other hand, the belief that William had been sentenced to life imprisonment

without the possibility of parole may have influenced defense counsel to tread lightly in attacking William on bias and caused the circuit court to find that evidence concerning William's sentence was not relevant. William's testimony was critical to the State's murder prosecution. The State's non-disclosures of the true facts concerning William's California plea, conviction, and sentence deprived Acker of valuable evidence that could have been used to forcefully impeach William's credibility.

In her Rule 40 Petition, Acker's prayer for relief did not request that the circuit court set aside all of her counts of conviction, but only her conviction on Count 6, the Murder charge. However, in its Amended FOF/COL & Order, the circuit court vacated all of Acker's convictions and sentences in Cr. No. 56042 and ordered a new trial. We conclude the circuit court erred to the extent that it vacated Acker's convictions and sentences other than her conviction and sentence for Murder.

First, vacating Acker's convictions and sentences other than her conviction and sentence for Murder goes beyond the relief requested by Acker in her Rule 40 Petition. Second, unlike her Murder conviction, Acker's other convictions were supported by compelling evidence besides William's testimony. For example, Joe Leach, the victim in Counts 1 through 3, identified Acker as the person who (along with a man) kidnapped and robbed him and stole his car. In addition, Acker in her own testimony admitted to participating with William in the offenses (other than Murder) charged in Counts 1 to 5 and 7 to 8 (the "non-murder counts"). Acker's defense as to the non-murder counts -- that she committed those offenses under duress -- was refuted by strong evidence presented by the State. Thus, we conclude that the State's non-disclosures did not affect the outcome of the non-murder counts and the circuit court was not justified in vacating the convictions and sentences on those counts.

We reject the points of error raised by Acker in her cross-appeal as being without merit.

Therefore,

The "Amended Findings of Fact and Conclusions of Law and Order Re Petitioner's Amended Petition to Vacate, Set Aside, or Correct Judgment; Order" filed on March 7, 2005, in the Circuit Court of the First Circuit is (1) affirmed to the extent that it grants Acker's amended petition and orders that her Murder conviction (Count 6) in Cr. No. 56042 be vacated and set aside for a new trial, and (2) vacated to the extent it orders that Acker's convictions and sentences in Counts 1 to 5 and 7 to 8 be vacated and set aside. This case is remanded with instructions that the circuit court enter an amended order consistent with our decision.

DATED: Honolulu, Hawai'i, September 27, 2007.

On the briefs:

David F. Klein,
Michael J. Brennan (pro hac vice)
(Post-Conviction Justice Project,
University of Southern California
Law School)
Shannon M. Henson (pro hac vice)
and Christina M. Moore (pro hac vice)
(Kirkland & Ellis LLP)
for Petitioner/Appellee/Cross-
Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Respondent/Appellant/Cross-
Appellee.

Corinne K. Watanabe

Presiding Judge

Daniel R. Foley
Associate Judge

Craig H. Nakamura

Associate Judge