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NO. CAAP-16-0000528

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

JAMES K. LIBERO, Petitioner-Appellant, v.  
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(S.P.P. NO. 16-1-0005(2); CR. NO. 98-0697(2))

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., and Leonard and Reifurth, JJ.)

Petitioner-Appellant James K. Libero appeals from the Findings of Fact, Conclusions of Law, and Judgment Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, filed on July 6, 2016 in the Circuit Court of the Second Circuit ("Circuit Court").<sup>1/</sup>

On October 4, 2000, Libero was convicted of Attempted Murder in the Second Degree, Assault in the First Degree, and Attempted Sexual Assault in the First Degree. On direct appeal, this court affirmed Libero's convictions for Attempted Murder in the Second Degree and Assault in the First Degree, but reversed the conviction for Attempted Sexual Assault in the First Degree. *State v. Libero*, 103 Hawai'i 490, 507 83 P.3d 753, 770 (App. 2003), cert. denied, 103 Hawai'i 479, 83 P.3d 742 (2004).

Between August 23, 2001 and February 20, 2013, Libero filed eight petitions for relief pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure. The first petition was denied because his direct appeal was still pending before this court.

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<sup>1/</sup> The Honorable Peter T. Cahill presided.

The subsequent seven petitions were also denied.

On April 21, 2016, Libero filed a Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody ("Ninth Petition"). On July 6, 2016, the Circuit Court issued Findings of Fact, Conclusions of Law, and Judgment Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, which denied Libero's Ninth Petition.

On appeal, Libero argues that if, as the prosecution claimed, he used a kiawe branch to assault the victim, there would have been "D.N.A. evidence from the victim and probably from Mr. Libero embedded within the branch. The absence of no [sic] D.N.A. on the kiawe branch contradicts certin [sic] prosecution testimony used to convict Mr. Libero and supports his contention that he should have a new trial." Libero also requests that "all the missing evidence" in the case be tested for D.N.A.

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 resolve Libero's point of error as follows and affirm.

Libero's contention that "[t]his issue is not about *raised or ruled upon or waived*[,] . . . [but] about the truth that the state prosecution attorney wants to have the courts to be blinded" (emphasis added) notwithstanding, his claim regarding the lack of D.N.A. evidence on the kiawe branch was previously raised and ruled upon in his second and sixth petitions. In addition, Libero raised the issue in his eighth petition, which was also denied. *State v. Libero*, No. CAAP-13-0000415, 2015 WL 3384440, at \*1 (Haw. App. May 22, 2015).

For the first time on appeal, Libero requests additional testing of evidence for D.N.A. Libero failed to request that the Circuit Court order additional testing of evidence in the Ninth Petition. Therefore, Libero's request is denied without prejudice to a post-conviction petition, in accordance with Hawaii Revised Statutes Chapter 844D, Part XI.

To the extent that Libero's appeal can be construed to assert any other point of error on appeal, Libero failed to prove

the existence of extraordinary circumstances to justify his failure to raise the issue in eight prior petitions for relief. Therefore, relief is not available. Haw. R. Penal P. 40(a)(3).

Therefore, IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Judgment Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, filed on July 6, 2016 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 26, 2017.

On the briefs:

James K. Libero,  
Pro Se Petitioner-Appellant.

Peter A. Hanano,  
Deputy Prosecuting Attorney,  
County of Maui,  
for Respondent-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge