

*** NOT FOR PUBLICATION ***

NO. 25751

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I,
Plaintiff-Appellee-Respondent,

vs.

JOSEPH P. PURTELL, JR.,
Defendant-Appellant-Petitioner.

HONORABLE
CLERK APPELLATE COURTS
STATE OF HAWAII

2005 MAY 31 AM 9:20

FILED

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 98-1051)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, JJ.; and Acoba, J.
concurring separately, with whom Duffy, J., joins)

On February 23, 2005, the defendant-appellant-petitioner Joseph P. Purtell, Jr. filed an application for writ of certiorari, requesting that this court review the summary disposition order (SDO) of the Intermediate Court of Appeals (ICA) in State v. Purtell, No. 25751 (January 28, 2005) [hereinafter, "the ICA's SDO"]. The ICA affirmed the March 25, 2003 findings of fact (FOFs), conclusions of law (COLs), and order of the circuit court of the first circuit, the Honorable Victoria S. Marks presiding, denying Purtell's motion for correction of illegal sentence pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35.

In his application for writ of certiorari, Purtell argues, inter alia (1) that the ICA violated the United States Constitution by impairing his ability to contract, (2) that

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Hawai'i Revised Statutes (HRS) §§ 605-2 (1993) and 605-14 (1993 & Supp. 2004) do not override the constitutional right to contract, (3) that the ICA "abused its discretion" in failing to follow Apprendi v. New Jersey, 530 U.S. 466 (2000), and (4) that this court must follow the decision of the United States District Court for the District of Hawai'i in Kaua v. Frank, 350 F.Supp.2d 848 (D. Haw. 2004).

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the ICA's SDO, but for the reasons stated herein.

Inasmuch as "[t]here is no right to lay counsel," United States v. Turnbull, 888 F.2d 636, 638 (9th Cir. 1989), the ICA did not err in affirming the circuit court's refusal to allow Purtell's "agent" to represent him in court. See United States v. Tran, 105 F.Supp.2d 608 (S.D. Texas 2000) ("Tran may not rely on others to assist him and then disavow their work when it is ineffectual."). See also HRS §§ 605-2 (1993) and 605-14 (1993).

Purtell was sentenced in 1999, prior to the Supreme Court's 2000 Apprendi decision. In light of this court's recent holding in State v. Gomes, No. 26466, slip op. (May 26, 2005), the ICA erred in reaching the merits of Purtell's appeal from the circuit court's denial of his HRPP Rule 35 motion, inasmuch as we held that new rule of criminal procedure announced in Apprendi does not apply retroactively on collateral attack. See United States v. Sanchez-Cervantes, 282 F.3d 664, 667 (9th Cir. 2002). See also See In re Tatum, 233 F.3d 857, 858 (5th Cir. 2000);

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Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000); Sepulveda v. United States, 330 F.3d 55, 63 (1st Cir. 2003); United States v. Sanders, 247 F.3d 139, 149-51 (4th Cir. 2001), cert. denied, 534 U.S. 1032 (2001); United States v. Moss, 252 F.3d 993, 997 (8th Cir. 2001), cert. denied, 534 U.S. 1097 (2002); and McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001), cert. denied, 536 U.S. 906 (2002). Nonetheless, we affirm the result reached in the ICA's SDO on the basis that the rule in Apprendi does not apply retroactively on collateral attack to Purtell's appeal. Therefore,

IT IS HEREBY ORDERED that the ICA's SDO is affirmed, although on the grounds stated in this order.

DATED: Honolulu, Hawai'i, May 31, 2005.

Joseph. P. Purtell, Jr.,
defendant-appellant-
petitioner pro se
on the writ

