

NO. 23288

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

WILLIAM WENDELL RAMSEY, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE SECOND CIRCUIT COURT
(S.P.P. NO. 97-0004(3))

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Petitioner-Appellant William Wendell Ramsey (Ramsey or Petitioner) appeals the Second Circuit Court's February 18, 2000 Order denying his August 9, 1999 Amended Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody. We affirm.

BACKGROUND

On August 18, 1994, a jury found Ramsey guilty of Burglary in the First Degree, Hawai'i Revised Statutes (HRS) § 708-810(1)(c) (1993), and Sexual Assault in the Third Degree, HRS § 707-732(1)(c) (1993).¹ The trial judge, acting Circuit Court Judge John T. Vail, sentenced Ramsey to ten years' imprisonment on the Burglary charge, five years' imprisonment on the Sexual Assault charge, both terms to run concurrently, and a mandatory minimum sentence of thirty months. The judgment was

¹ For a summary of original case background and procedural history see Ramsey v. State, 91 Hawai'i 139, 980 P.2d 1013 (1999).

entered on October 28, 1994. No direct appeal was filed from this judgment.

On March 17, 1997, Ramsey, *pro se*, filed a Petition for Post-Conviction Relief under Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP). On September 30, 1997, Circuit Court Judge Boyd P. Mossman, without a hearing, entered a Decision and Order Denying Rule 40 Petition. Ramsey, still *pro se*, then filed a notice of appeal. Matthew S. Kohm was appointed as appellate counsel for Ramsey on November 19, 1997.

Ramsey filed his opening brief on March 28, 1998, arguing that he was entitled, based on various grounds, to an evidentiary hearing. On January 19, 1999, this court issued a memorandum opinion affirming, in part, the September 30, 1997 Decision and Order Denying Rule 40 Petition and vacating, in part, the portion

denying Ramsey's claims that (1) his conviction was unconstitutional because the chairperson of the jury coerced three other jurors to change their vote to "guilty"; (2) he was denied effective assistance of counsel because defense counsel failed to properly advise him on his decision to testify at trial; and (3) he was denied effective assistance of counsel because defense counsel failed to file an appeal on his behalf. We remand this case with instructions that the court conduct an HRPP Rule 40 evidentiary hearing on these claims and permit Ramsey to file an amended HRPP Rule 40 petition.

On March 31, 1999, appellate counsel filed a Motion for Withdrawal and Appointment of New Counsel. On April 19, 1999, Kyle Coffman (present counsel) was appointed as new counsel for Ramsey.

On August 9, 1999, Ramsey filed an "Amended Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody." On August 11, 1999, Ramsey filed "Petitioner's Motion to Have the Honorable John T. Vail Preside Over His Evidentiary Hearing," which was set for August 26, 1999. Present counsel for Ramsey stated in his declaration:

3. The trial on the underlying criminal convictions was extended, tumultuous and took unexpected turns. The trial was a very difficult one, as Judge Vail continually attested. Judge Vail will almost certainly have a clear recollection of this trial. He will be better able to read the trial transcripts and understand the impact, or lack thereof, of what was said and what was not said. Any other judge will be at a decided disadvantage in evaluating the factual arguments concerning ineffective assistance of counsel.

At the August 17, 1999 hearing on the motion, the court denied Ramsey's motion.

On August 26, 1999, Circuit Court Judge Joseph E. Cardoza held a hearing on the issue of ineffective assistance of counsel based on counsel's alleged failure to properly advise Ramsey on his decision to testify and to file an appeal. Ramsey testified that Joy Yanagida (Yanagida), his trial counsel, did not discuss with him in any detail whether or not to testify and that if he did not choose to testify that it was his constitutional right and the jury would be instructed not to hold it against him. In addition, Ramsey stated that Yanagida ignored his requests to file an appeal and told Ramsey to "[s]hut up and do your damn time" and that he "only got two and a half years from the judge, anyway, so [he] might as well do that." Ramsey

also alleged that Yanagida was always hostile toward him throughout trial. Finally, Ramsey stated that he had never discussed an appeal or other trial matters with Franklin Krau (Krau), the private investigator working with Yanagida on the case.

On cross-examination, Ramsey admitted that Yanagida represented him at the parole board hearing but he explained that he "had no one else to turn to, and she was the only available one at the time, so [he] needed to use her as much as [he] could in what she could do for [him.]" Ramsey denied that Yanagida had told him that a good issue for appeal would be whether kissing a woman on the breast above her clothes constituted sexual contact. He also denied that he was the one who decided not to appeal and that his reason was that he would be released from prison before the appeal would be decided.

On September 7, 1999, the evidentiary hearing continued with the testimonies of Yanagida and Krau. Yanagida testified that she met with Ramsey "a number of times," "[l]ess than a dozen but close to a dozen" prior to trial. She stated that Ramsey was committed to testifying at trial and adamant about his innocence. Yanagida asserted that she had advised Ramsey of his constitutional right not to testify and that choosing not to testify would not be held against him. Yanagida hired Krau to assist in the investigation of the case and that, as far as she

could remember, Krau was present at every meeting with Ramsey when others were not present. After the trial verdict was announced, Yanagida explained to Ramsey that the decision to appeal was his and that, after sentencing, Ramsey was not inclined to appeal because Yanagida "couldn't get him out pending the appeal." Concerning her representation of Ramsey in front of the Hawai'i Paroling Authority, Yanagida noted that Ramsey could have requested the case be referred back to the public defender's office and that up to and through the hearing, Ramsey "was very grateful and he did not say that he wanted [Yanagida] to withdraw, and he did not say that he was displeased with the work that [Yanagida and Krau] had done on his behalf."

Krau testified that he was hired to work as an investigator by Yanagida who was representing Ramsey at the time. He met with Ramsey on numerous occasions and was present during meetings with Yanagida. Krau stated that the topic of whether Ramsey should testify was brought up on more than one occasion and that Ramsey understood that the final decision to do so was his own. On cross-examination, Krau confirmed that on his billing voucher he only declared meeting with Ramsey one time, but explained that "there are some things I didn't charge for. There were times that we would meet in [Yanagida's] office where I'd be working on something else and we would be discussing it."

On September 14, 1999, the court heard evidence on the issue of jury misconduct. Ramsey testified that after trial, but before sentencing, he spoke with juror Corby Higa (Higa) who allegedly approached Ramsey at Kahului Harbor. Ramsey further testified that Higa told him that Higa and three other jurors voted not guilty but were coerced by the lead juror to change their votes. Ramsey also stated that Carol Balao, his then employer, now known as Carol Ann Jackson (Balao), was present during his discussion and was very shocked by the alleged revelation. On cross-examination, Ramsey admitted that Yanagida was still his counsel at that time but could not remember if he told her about the conversation with Higa. In addition, Ramsey admitted that he did not tell the court at sentencing about the alleged conversation and also that, in his first Rule 40 petition, he did not specify "how this juror was coerced and how [Ramsey] had the discussion with [Higa] at Kahului [Harbor.]"

The evidentiary hearing on jury misconduct was then continued until October 7, 1999, to allow the defense to locate Balao to testify. The court then heard argument on other issues. Ramsey requested permission to call Judge Vail, the judge presiding over Ramsey's criminal trial, as a witness to testify to "the materiality of [Ramsey's] testimony in terms of his conviction." This request was denied. Ramsey then requested permission to call Keith Stancil (Stancil), Darryl Gonsalves

(Gonsalves), and Earl Chung (Chung) as witnesses. The court allowed Ramsey to call these three witnesses at the October 7, 1999 evidentiary hearing.

On October 7, 1999, Stancil testified that he was a prosecution witness at Ramsey's trial but was later incarcerated together with Ramsey at the Kulani Correctional Facility (Kulani) in Hilo in 1996 or 1997. At Kulani, Ramsey approached Stancil and said, "The prosecution went pressure you into saying what you said, huh?" Stancil replied that he had told the truth on the stand and "wasn't pressured into saying what [he] said." He also stated that he knew Chung and Gonsalves but did not remember them being present during this conversation with Ramsey. Finally, Stancil denied having an arrangement with the prosecutor to receive a more lenient sentence in exchange for testimony against Ramsey.

Chung testified that while incarcerated at Kulani, Ramsey, Stancil, Gonsalves, and he were sitting in the dorm bunks area. There, Stancil allegedly told Ramsey that if he had not testified against Ramsey, Stancil would have done a lot more time and that "[t]he prosecutors told [Stancil] what to say." Gonsalves similarly testified that Ramsey and Stancil had a conversation where Stancil said he was coached by the prosecutors.

On October 29, 1999, Higa, the juror who allegedly told Ramsey about jury misconduct, testified. Higa stated that he saw Ramsey at Kahului Harbor after the trial was completed. Higa was there with two friends and Ramsey drove up with his boss, a female. Ramsey then approached Higa and initiated a conversation with him asking why Higa had voted to convict Ramsey. Higa denied telling Ramsey that he was coerced or in any manner pressured to change his vote during deliberations. He could not remember if the subject of coercion or undue pressure was brought up during his discussion with Ramsey.

On November 12, 1999, Balao testified that Ramsey "used to work with [her]" and she was not sure if she went with Ramsey to Kahului Harbor shortly after trial. She confirmed that there was a conversation between Ramsey and a juror but could not remember much about the conversation. Balao explained that she had problems with memory and illness and that she was on medication and under a doctor's care. Regarding the conversation between Ramsey and Higa, she stated:

It was just a young guy. I believe he was one of the jurors. He was a young, kind of short guy, curly hair. I remember that, and he mentioned something about being the youngest juror there, and about feeling it was hard for him -- that he felt he was innocent, but it was hard for him to make decisions. I mean vaguely word-for-word, that's all, you know, basically, that I listened to. I didn't really just stand there to listen to the whole conversation.

. . . .

That's just his opinion, I guess. He didn't come out and say -- how would you say the word -- innocent, that he felt that. Yeah, I guess his opinion -- right -- is that his opinion innocent. I

don't know. I am not going to say. I am being cornered. I feel I am being told to say all of this. I really do.

Balao also stated that she did not hear the juror say anything about being pressured or coerced to change his vote and did not remember the juror saying anything about other jurors thinking Ramsey was innocent. She could not remember telling Gary Gates (Gates), an investigator hired by Ramsey, that the juror told Ramsey that the juror was coerced or pressured into changing his vote.

On November 23, 1999, Gates testified that he spoke with Balao on the phone in August of 1999 about the conversation between Ramsey and Higa and that Balao had said Higa told Ramsey that he felt Ramsey was innocent but none of the other jurors on the jury did.

Ramsey's present counsel then orally requested that the court allow expansion of the investigation into jury misconduct by allowing an informal inquiry of the other members of the jury. The court requested that counsel put this request in writing. On November 26, 1999, Ramsey filed a Memorandum Regarding Jury Misconduct requesting "that the jury members be subpoenaed for the purpose of testifying as to any improper commentary, conduct or any other objective irregularities concerning the jury."

On November 30, 1999, after reviewing the submissions and evidence presented, the court decided that there was no basis for having any jurors brought to court for examination and

ordered the hearing with respect to the issue of jury misconduct concluded. On February 18, 2000, the court, after receiving proposed Findings of Fact and Conclusions of Law (FsOF and CsOL) from both parties, entered its written FsOF and CsOL; Order, in relevant part, as follows:

FINDINGS OF FACT

1. Joy Yanagida, while acting as counsel for Petitioner, appropriately advised Petitioner of his constitutional right to testify at trial and his constitutional right not to testify, and she explained to Petitioner that if he chose to testify at trial, he would be subject to cross-examination by the prosecuting attorney;
2. This advisement was given prior to the start of trial;
3. After being appropriately advised of the potential ramifications, Petitioner made an informed decision to testify at his trial;
4. Joy Yanagida advised Petitioner that he had a valid legal issue to appeal the verdict in the case;
5. Soon after the conclusion of the trial and before the appeal filing deadline, Joy Yanagida recommended to Petitioner that an appeal be filed on his behalf;
6. At the time Joy Yanagida recommended that an appeal be filed, she told Petitioner that she was willing and able to write the appeal on his behalf;
7. Petitioner would not give his consent to Joy Yanagida to file an appeal on his behalf;
8. There is no evidence to indicate Petitioner was dissatisfied with Joy Yanagida's services prior to his filing of a Rule 40 petition;
9. There is no evidence that any juror was forced, coerced, or manipulated into voting for a guilty verdict;
10. There is no evidence to support Petitioner's allegation that Keith Stancil lied on the stand, was coached, was told what to say, or that he got any special treatment for testifying;
11. There is every indication that Keith Stancil's testimony was truthful, and he was not unduly influenced by the deputy prosecuting attorney;

12. All other claims raised by Petitioner are without merit.

CONCLUSIONS OF LAW

1. Joy Yanagida effectively advised Petitioner of his constitutional right to testify and not to testify;

2. Joy Yanagida effectively advised Petitioner of the potential ramifications of his decision to testify;

3. Joy Yanagida effectively advised Petitioner that an appeal would be appropriate;

4. Petitioner's refusal to authorize an appeal prevented Joy Yanagida from filing [an] appeal on his behalf;

5. Petitioner received a trial by a fair and impartial jury;

6. Petitioner has failed to reach the minimal threshold to indicate that a prosecution witness at trial testified falsely.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner's Petition to Vacate, Set Aside, or Correct Judgement or to Release Petitioner from Custody is denied.

QUESTIONS ON APPEAL

1. Did the circuit court reversibly err in refusing to allow inquiry of more jurors regarding the issue of jury misconduct?

2. Did the court reversibly err in ruling that the minimal threshold was not met regarding alleged falsehoods in Keith Stancil's testimony?

3. Did Ramsey willingly and knowingly waive his right to appeal?

4. Was Ramsey denied effective assistance of counsel?

5. Did Ramsey have a right to have a specific judge preside over his Rule 40 hearing?

STANDARDS OF REVIEW

A.

Rule 40 Petition

With regard to the denial of a HRPP Rule 40 petition without an evidentiary hearing, HRPP Rule 40(f) provides in relevant part:

If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition or at any later proceeding.

In addition, this court has previously stated:

As a general rule, a hearing should be held on a Rule 40 petition for post-conviction relief where the petition states a colorable claim. To establish a colorable claim, the allegations of the petition must show that if taken as true the facts alleged would change the verdict, however, a petitioner's conclusions need not be regarded as true. Where examination of the record of the trial court proceedings indicates that the petitioner's allegations show no colorable claim, it is not error to deny the petition without a hearing. *The question on appeal of a denial of a Rule 40 petition without a hearing is whether the trial record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court.*

[State v.] Allen, 7 Haw. App. [89,] 92-93, 744 P.2d [789,] 792-93 [(1987)] (emphasis added).

. . . [T]he appellate court steps into the trial court's position, reviews the same trial record, and redecides the issue. Because the appellate court's determination of "whether the trial record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court" is a question of law, the trial court's decision is reviewed *de novo*. See United States v. Burrows, 872 F.2d 915 (9th Cir.1989) (denial of a post-conviction motion based on ineffective assistance of counsel without conducting an evidentiary hearing is reviewed *de novo* for a determination of whether the files and records of the case conclusively show that

petitioner is entitled to no relief). Therefore, we hold that . . . the issue whether the trial court erred in denying a Rule 40 petition without a hearing based on no showing of a colorable claim is reviewed de novo; thus, the right/wrong standard of review is applicable.

Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999).

B.

Findings of Fact and Conclusions of Law

The standard of review applicable to a finding of fact is the clearly erroneous standard of review. That standard is as follows:

A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with the definite and firm conviction that a mistake has been committed.

State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995).

It is for the trial judge as fact-finder to assess the credibility of witnesses and to resolve all questions of fact; the judge may accept or reject any witness's testimony in whole or in part. Lono v. State, 63 Haw. 470, 473, 629 P.2d 630, 633 (1981). As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous. Id. at 473-74, 629 P.2d at 633. An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge. Domingo v. State, 76 Hawai'i 237, 242, 873 P.2d 775, 780 (1994); Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 117, 839 P.2d 10, 28 (1992), *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992); State v. Aplaca, 74 Haw. 54, 65-66, 837 P.2d 1298, 1304-05 (1992).

State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 37, 65 (1996).

"The circuit court's conclusions of law are reviewed under the right/wrong standard." State v. Pattioay, 78 Hawai'i 455, 459, 896 P.2d 911, 915 (1995) (citation omitted). "A conclusion of law that is supported by the trial court's findings

of fact and that reflects an application of the correct rule of law will not be overturned." Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994).

C.

Ineffective Assistance of Counsel

"In assessing claims of ineffective assistance of counsel, the applicable standard is whether, 'viewed as a whole, the assistance provided was within the range of competence demanded of attorneys in criminal cases.'" Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

[T]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

Determining whether a defense is "potentially meritorious" requires an evaluation of the possible, rather than the probable, effect of the defense on the decision maker. . . . Accordingly, no showing of "actual" prejudice is required to prove ineffective assistance of counsel.

Barnett v. State, 91 Hawai'i 20, 26-27, 979 P.2d 1046, 1052-53 (1999) (ellipsis in original, citations and internal quotation marks omitted).

DISCUSSION

A.

With respect to the allegation of jury misconduct, the court did not err in refusing to allow inquiry of more jurors.

Ramsey contends that "[t]he trial court committed reversible error when it ruled that Petitioner received a fair

trial by a fair and impartial jury without allowing inquiry of more jurors to determine the issue of jury misconduct." Ramsey correctly states that a juror is competent and may testify as to any improper or undue conduct or statements made by any other juror. Stratis v. Pacific Ins. Co., Ltd., 7 Haw. App. 1, 739 P.2d 251 (1987). Also, that a "defendant bears the initial burden of making a *prima facie* showing of a deprivation that 'could substantially prejudice [his or her] right to a fair trial' by an impartial jury." State v. Furutani, 76 Hawai'i 172, 181, 873 P.2d 51, 60 (1994) (citation omitted).

Higa allegedly told Ramsey that "[Higa] and three other members of the jury thought that [Ramsey] was not guilty[,] and that the jurors "changed their vote from not guilty to guilty only because they were coerced by the 'lead' juror." During the evidentiary hearing, however, Higa repeatedly denied making any such statements to Ramsey during their chance meeting at Kahului Harbor. Higa's alleged "confession" was the only basis for Ramsey's jury misconduct claim and the court stated that it was "completely satisfied" with Higa's contrary testimony at the hearing. Ramsey was afforded an evidentiary hearing on the issue of jury misconduct and, based on the court finding Higa credible, we conclude the court did not err in refusing to allow more jurors to be subpoenaed to testify.

B.

The court did not err in finding Stancil's testimony credible and apparently discounting the testimony of Ramsey, Chung, and Gonsalves.

In this point on appeal, Ramsey seems to argue that just because he, Chung, and Gonsalves all testified essentially that Stancil told them he had been pressured into giving false testimony to get a lighter sentence, it must be the truth. As stated above, the trier of facts, in this case Judge Cardoza, determines the credibility of any and all witnesses. "An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses and the weight of the evidence, because this is the province of the trial judge." Eastman, 81 Hawai'i at 139, 913 P.2d at 65.

C.

Ramsey knowingly and willingly waived his right to file an appeal.

The court found that Yanagida had advised Ramsey that she thought he had a valid legal issue to appeal the verdict and that Ramsey would not give his consent for Yanagida to file an appeal. The affidavit and testimony of Yanagida and Krau validate these FsOF by the court.

Ramsey then argues that

[e]ven if trial counsel's testimony and related declaration is true, she misinformed Petitioner about the time period of his appeal. She claim [sic] to have told Petitioner that his appeal might not be decided until after his mandatory minimum of two years, six months had run. This court can take judicial notice that direct appeals do not take nearly that long.

We will not take such judicial notice. Moreover, the record does not support the suggestion that Ramsey's decision not to appeal was based on trial counsel's alleged statement "that his appeal might not be decided until after his mandatory minimum of two years, six months had run." Ramsey repeatedly testified at the evidentiary hearing that he wanted to appeal the conviction but was allegedly ignored by his trial counsel.

D.

Ramsey was not denied effective assistance of counsel.

Ramsey argues that he was denied effective assistance of counsel when Yanagida allegedly failed to perform the following for Ramsey:

- a. Raise ignorance or mistake of fact as a defense;
- b. Raise intoxication as a defense;
- c. Consolidate Ramsey's probation violation at sentencing; and
- d. Follow up on a mental examination of Ramsey.

HRPP Rule 40(f) directs that "the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner." In its FsOF, the court concluded that the various claims listed in this section were "without merit."

1. Failure to raise ignorance or mistake of fact as a defense.

Ramsey argues that he was entitled to a jury instruction on the defense of mistake of fact relating to the burglary charge against him. His basis is that "[t]he jury could have determined that [Ramsey] entered the property with a mistaken belief that he was permitted to come on the property."

The fact that a specific defense was not raised at trial does not automatically give rise to a claim for ineffective assistance of counsel. "Our cases have firmly established that a defendant is entitled to an instruction on every defense or theory of defense having any support in the evidence, provided such evidence would support the consideration of that issue by the jury, no matter how weak, inconclusive, or unsatisfactory the evidence may be." State v. Sawyer, 88 Hawai'i 325, 333, 966 P.2d 637, 645 (1998) (citations and internal quotation marks omitted, emphasis in original); see also State v. Russo, 69 Haw. 72, 76, 734 P.2d 156, 158 (1987). "However, this court has also noted that 'where evidentiary support for [an] asserted defense, or for any of its essential components, is clearly lacking, it would not be error for the trial court to refuse to charge on the issue or to instruct the jury not to consider it.'" Sawyer, 88 Hawai'i at 333, 966 P.2d at 645 (quoting State v. Moore, 82 Hawai'i 202, 210, 921 P.2d 122, 130 (1996) (citation omitted)) (brackets in

original); see also Russo, 69 Haw. at 76, 734 P.2d at 158; State v. Warner, 58 Haw. 492, 498-99, 573 P.2d 959, 963 (1977).

In support of his contention, Ramsey points out that he "was with [the victim] for a long period the night before the incident" where the victim "admitted going to [Ramsey's] house and being in a darkened room, on a bed with him" and that the next day the victim "allowed [Ramsey] into her house, where they drank beers and socialized" with friends of the victim. However, no reasonable person would view these facts as permission to enter the victim's darkened house, much less her closed bedroom, during the middle of the night. Therefore, the evidence submitted does not cause the defense of mistake of fact to be "potentially meritorious."

2. Failure to raise intoxication as a defense.

Ramsey argues that intoxication "could have explained [Ramsey's] actions more clearly to the jury" and that "[i]t could have persuaded the jury that he lacked the ability to consciously engage in conduct to meet the 'intent' mens rea of the burglary charge." Contrary to Ramsey's allegation that intoxication was not raised as a defense, the following instruction was read to the jury regarding intoxication:

Evidence of self-induced intoxication of the defendant may not be used to negative the state of mind sufficient to establish an element of the defense -- I'm sorry, element of the offense. However, evidence of self-induced intoxication of the defendant may be used to prove or negative conduct or to prove state of mind sufficient to establish an element of an offense.

3. Failure to consolidate Ramsey's probation violation at sentencing.

Ramsey argues that Yanagida's failure to consolidate Ramsey's probation violation with this case at sentencing "exposed [Ramsey] to consecutive sentencing, a longer sentence than might be imposed by a single judge." However, Ramsey does not disagree with Respondent-Appellee State of Hawai'i's response that the probation violation re-sentencing pertained to an unrelated matter, Yanagida was not representing Ramsey in the other matter, and the motion to revoke probation had not yet even been filed when Ramsey was sentenced in this case. Therefore, there was no ineffective assistance of counsel in this regard.

4. Failure to follow up on a mental examination of Ramsey.

Before trial, Yanagida obtained a preliminary mental examination of Ramsey in which "a psychologist indicated that [Ramsey] had some cognitive problems in his mental functioning." Ramsey argues that "[t]he mere fact that [Ramsey] could function in society pretrial on bail does not necessarily mean he could meaningfully participate in his defense, or understand right and wrong." Also, Ramsey suggests that he might not have been "mentally competent on the night in question."

On July 15, 1994, Yanagida in fact did file a "Notice of Intention to Rely on Defense of Physical or Mental Disease, Disorder or Defect and Motion for Mental Examination of

Defendant." On July 27, 1994, a hearing was held on this motion. Yanagida argued that she had recently been made aware that Ramsey had been diagnosed with schizophrenia. After both sides presented their case, the court ruled:

Well, I'm going to find that there's not -- despite the affidavit of this doctor, I'm going to find that it is not -- or sufficient grounds for this Court to delay the trial, which has been sitting around for quite some time. I don't see that there's any prejudice to [Ramsey]. He appears to be able, under medication, to comprehend and is competent to sit in court and participate in his own defense.

And as regards the question of his volitional or cognitive capacity at the time in 1993, I don't think that's, again, been adequately demonstrated that there is a need at this point to have him examined or that an examination would be able to result in any -- any concrete factors which would have to be considered by this Court.

Accordingly, the Court will deny the motion for mental exam and the trial will proceed.

The relevant FsOF and CsOL were filed on August 4, 1994. Therefore, there was no ineffective assistance of counsel in this regard.

E.

Ramsey did not have a right to have
Judge Vail preside over Ramsey's
HRPP Rule 40 evidentiary hearing.

At the time of Ramsey's HRPP Rule 40 evidentiary hearing, Judge Vail had been retired for some time as a full time district court judge but was then a per diem district court judge. In his final point on appeal, Ramsey argues that "[b]ecause Judge Vail presided over the trial, he was in a position to know of [Ramsey's] behavior at trial and the prejudicial effect of his testimony." In the circuit court and

again on appeal, Ramsey failed to cite any law or rule supporting this alleged right. We decide that the court did not abuse its discretion when it declined to have Judge Vail preside over Ramsey's evidentiary hearing.

CONCLUSION

Accordingly, we affirm the Second Circuit Court's February 18, 2000 Order denying Petitioner-Appellant William Wendell Ramsey's August 9, 1999 Amended Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody.

DATED: Honolulu, Hawai'i, August 28, 2001.

On the briefs:

Kyle B. Coffman
for Petitioner-Appellant.

Chief Judge

Simone C. Polak,
Deputy Prosecuting Attorney,
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for Respondent-Appellee.

Associate Judge

Associate Judge