

NO. 26991

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

MARK BRANTLEY, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 03-1-0012(2))

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

SUMMARY DISPOSITION ORDER

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

Mark Allan Brantley (Petitioner) appeals the November 10, 2004 findings of fact, conclusions of law and judgment filed by the Circuit Court of the Second Circuit (circuit court).¹ The circuit court denied his July 22, 2003 Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2003) petition for post-conviction relief, as amended on August 12, 2003 (collectively, the Rule 40 petition), after holding an August 26, 2004 evidentiary hearing on the Rule 40 Petition (the Rule 40 hearing).

The Rule 40 petition sought to vacate the November 4, 1994 judgment that convicted Petitioner, upon a jury's verdict, of kidnapping, murder in the second degree and related firearms offenses (a judgment re-sentencing him as a result of his direct appeal was filed on March 6, 1997). As grounds, the July 22, 2003 petition claimed that the circuit court prejudicially failed

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The Honorable Shackley F. Raffetto presided.

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to personally advise Petitioner of his right to testify at trial, as is required by Tachibana v. State, 79 Hawai'i 226, 236, 900 P.2d 1293, 1303 (1995). The August 12, 2003 amended petition added the charge that trial counsel rendered ineffective assistance by preventing Petitioner from testifying.

On appeal, Petitioner first contends the circuit court abused its discretion when, at the beginning of the Rule 40 hearing, newly-retained counsel (accompanied by Petitioner's public defender, who had been appointed almost two months before) moved to continue the hearing for lack of preparation and the circuit court denied the motion. Also, now acknowledging that the prospective Tachibana holding did not apply at his trial, Tachibana, 79 Hawai'i at 238, 900 P.2d at 1305, Petitioner now avers a denial of his right to testify as an independent constitutional claim, complaining that the circuit court failed to ascertain at the Rule 40 hearing whether Petitioner was properly advised of and knowingly and intelligently waived that right at trial. Finally, Petitioner charges that the circuit court erroneously rejected his claim that trial counsel rendered ineffective assistance by preventing him from testifying.

At the Rule 40 hearing, Petitioner testified, in essence, that he and his trial counsel did not at any time before or during the trial discuss his absolute right to testify, only

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the reasons he should not testify, and that trial counsel told him at trial that he "can't testify" despite his professed desire to do so.

After a meticulous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we dispose of Petitioner's appeal as follows.

HRPP Rule 40(a)(3) provides:

Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. Except for a claim of illegal sentence, an issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

Petitioner waived the issues he raised in his Rule 40 petition because he did not raise them in his direct appeal via appellate counsel, State v. Brantley, 84 Hawai'i 112, 929 P.2d 1362 (App. 1996), and related filings; nor in his motion via appellate counsel, filed January 12, 1999, to reverse one of his firearms convictions and to re-sentence accordingly; nor in his appeal via appellate counsel of the circuit court's May 25, 1999 order denying his January 12, 1999 motion, State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002); nor, we notice, in his unsuccessful March 11, 2003 habeas corpus petition in the United

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States District Court for the District of Hawai'i.

Petitioner submits on appeal, however,

that his testimony at the Rule 40 hearing was sufficient to rebut the presumption of a knowing and understanding failure to raise the issue of the denial of his right to testify. Petitioner testified that he told his appellate attorney . . . about this issue, as an issue to be raised on appeal; however, [appellate counsel] did not feel that there was an appealable issue. (8/26/04 TR: 16-17). Petitioner explained that he believed [appellate counsel] "did not understand" what Petitioner meant when Petitioner had tried to discuss this issue with him. (Id.: 46). Petitioner did not pursue this issue further with [appellate counsel], and explained why as follows:

. . . well, I'm not a legal expert. At the time I can only rely on what my attorney was saying. When I was arrested I was very, very ignorant of the law to my shame. And I didn't know the difference between a misdemeanor and a felony. I didn't even know that basic thing right there.

(8/26/04 TR: 17-18).

While the record is not explicitly clear, the defense submits that Petitioner did not raise this issue in any of his subsequent motions because he accepted [appellate counsel's] assessment that this issue was not appealable. Petitioner further explained that he only learned about the right to testify and thus filed the instant motion, when,

It was brought to my attention by a Thomas Schillaci, who's [sic] wife was convicted of a crime and had her conviction reversed based on not testifying at her trial. And that's what got the wheels rolling.

That's when I really understood that I had the right to testify. I wasn't aware of having this absolute right to testify. [Trial counsel] did not tell me I have the right to testify. My appellate attorney did not understand what I meant when I told him about this, and it just slid all the way until this point. . . .

(8/26/04 TR: 46). Under HRPP Rule 40(a)(3), Petitioner cannot be deemed to have knowingly and understandingly failed to raise the issue of his failure to testify, when he was never aware that it was an issue he could raise.

Reply Brief at 6-7 (record citations and use of "[sic]" in the original).

The problem with Petitioner's attempt to avoid HRPP

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Rule 40(a)(3) waiver is the circuit court's finding that "Petitioner's testimony at the HRPP Rule 40 hearing held August 26, 2004, was not credible against the weight of the evidence." "Furthermore, it is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence." Tachibana, 79 Hawai'i at 239, 900 P.2d at 1306 (brackets, citation and internal quotation marks omitted). Accordingly, we conclude that Petitioner "is unable to prove the existence of extraordinary circumstances to justify [his] failure to raise the issue[s]. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure[,] " HRPP Rule 40(a)(3), and Petitioner failed to rebut that presumption.

But even assuming, *arguendo*, that there was no HRPP Rule 40(a)(3) waiver, we would nonetheless conclude that the circuit court did not abuse its discretion in denying Petitioner a continuance of the Rule 40 hearing. State v. Smith, 106 Hawai'i 365, 380, 105 P.3d 242, 257 (App. 2004). And because Petitioner's testimony at the Rule 40 hearing was integral to his other claims -- that he was not properly advised of and did not knowingly and intelligently waive his right to testify, and that trial counsel rendered ineffective assistance by preventing him from testifying -- the circuit court's finding that his Rule 40

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hearing testimony was "not credible against the weight of the evidence" dictates that we would hold against Petitioner on those claims as well. Tachibana, 79 Hawai'i at 239, 900 P.2d at 1306.

Therefore,

IT IS HEREBY ORDERED that the circuit court's November 10, 2004 findings of fact, conclusions of law and judgment are affirmed.

DATED: Honolulu, Hawai'i, September 1, 2006.

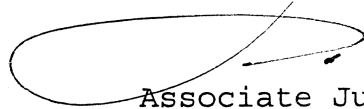
On the briefs:

Karen T. Nakasone,
Deputy Public Defender,
for Petitioner-Appellant.

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
County of Maui,
for Respondent-Appellee.

Corinne K.C. Watanabe

Presiding Judge



Associate Judge

Craig M. Nakamura

Associate Judge